(1)

Supreme Court, U.S.
FILED

NO. 99 33 JUN 30 1999

OFFICE OF THE CLERK

In The

Supreme Court of the United States

Nelson Fernandes,
Petitioner,

v.

EPA, Administrator of the EPA,
Regional Administrator for Region II,
Commissioner of NJDEP,
Rockaway Township Town Council,
Attorney General of the United States,
Respondents.

Petition for Writ of Certiorari

Nelson Fernandes, Pro-Se
9 Fox Run
Denville, N.J. 07834
(973) 627 – 2138

11088

Questions Presented for Review

1. Did the panel abuse its discretion by denying petitioner's motion to recall the mandate on any of the issues presented. Calderon v. Thompson, 118 S. Ct. 1489, 1498 (1998).

2. Petitioner's appellate brief cited standards of review to compel reading the complaint, accepting its allegations as true and determining if the district court abused its discretion (Exh. M). Does refusal to comply in the appeal and motion to recall deny petitioner the right to be heard (denied due process) since his complaint was dismissed for failure to state a claim, especially after arguing the district court's failure to read the complaint (Exh. N) and showing the allegations differed from its rulings. And does that refusal plus the conduct outlined in the certification (Exh. Q) prove extrajudicial bias. And do oversights violate the law argued since they may be deliberate denials of due process.

3. Did the panel abuse its discretion or deny due process by not vacating the August 95 order since it is void.

4. Did failure to disclose the fact that the allegations in the complaint were unrelated to the panel's basis for affirmation amount to a fraud on the court or a denial of due process.

Parties

The caption includes the names of all the parties

Table of Contents

Official and Unofficial.....1

Basis for Jurisdiction.....2

Constitutional Provisions and Statutes Involved.....3

Statement of the Case - Review for Abuse of Discretion ...3

Summary of the Grounds Given to Recall the Mandate.....5

Authorities Cited in the Motion to Support Recall 7

Authorities Cited on Extrajudicial Bias by the Panel.....9

Fraud Upon Appellate Court or Due Process Violation 11

The August 95 Order is Void in Three Ways 15

Refusal to Read Complaint Denied Due Process.....18

Substantial Prejudice on State of Limitations Issue 23

Grounds for the Accepting Certification as Proof of Bias..25

Recusal of the Panel and Judge Walls.....26

Conclusions.....27

Table of Authorities

Cases:

Accord, Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 366, n. 1 (1973) 37
Aerojet-General Corp. v. American Arbitration Assoc., 478 F.2d 248, 254 (9th Cir.1973) 7
Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986). 9
ALA Inc. v. CCAIR Inc., 29 F.3d 855 (C.A.3 1994) 18
Alexander v. Robertson, 882 F.2d 421, 424 (9th Cir. 1989) 11
Arizonal v. California, 460 U.S. at 618 n.8). 16
Armstrong v. Manzo, 380 U.S. 545, 552 (1965)) 14, 24
Assoc. Gen. Cont. of Conn. Inc. v. New Haven, 41 F.3d 62 (2d Cir.1994) 6
Averbach v. Rival Mfg. Co., 809 F.2d 1016, 1020 (3d. Cir. 1987)). 12
Bandai America Inc. v. Bally Midway Mfg. Co., 775 F.2d 70 (3rd Cir.1985). 7
Board of Trustees V. Centra, Inc., 983 F.2d 495, 504 (3d Cir. 1992)." .21
Brady v. Maryland, 373 U.S. 83, 86 . . (1963) 13
Briggs v. Pa. R.R. Co., 334 U.S. 304, 306, 92 L. Ed. 1403 (1948) 7
Calderon v. Thompson, 118 S. Ct. 1489, 1498 (1998) 2, 9, 25
Cardascia, 951 F.2d at 482) 4
Casamento, 887 F.2d at 1149-50 ..... 4, 21
Christianson, 486 U.S. at 817). 16
Cont. Casualty Co. v. Dominick D'andrea Inc., 150 F.3d 245 (3d Cir. 1998) 7, 18, 24
Cook v. Peter Kiewit Sons Co., 775 F.2d 1030, 1037 & n.13 (9th.Cir.1985) 21
Davis v. Bd. of Sch. Comm. of Mobile County, 517 F.2d 1044, 1051 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976). 9
Deutsch v. U.S., 67 F.3d 1080, 1083 (3d. Cir. 1995) 17
Dilaura v. Power Auth., 982 F.2d 73 (2d.Cir.1992)) 16
Graham v. Johnson, No. 99-22014 (5th Cir. 02/25/1999) 2
Greater Boston TV Corp., 463 F.2d 268 (D.C. Cir.1971). 8
Groden v. Random House Inc., 61 F.3d 1045 (2d Cir.1995) 10
Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982) 17
Gulf Oil Corp. v. Comm. of I.R.S., 914 F.2d 396 (3d.Cir.1990) 18
Haines v. Kerner, 404 U.S. 519, 520 ..... 8, 14, 18, 19, 21, 23, 24
Hall v. Marion Sch. Dist. No.2, 31 F.3d 183 (4th Cir.1994) 10
Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 245-46, (1944) 7
Hughes v. Rowe, 449 U.S. 5 (1980)). 20
Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 714 (1986) 4

Table of Authorities

Inter. Union UAW v. Mack Tr. Inc., 820 F.2d 91, 95 (3d.Cir.1987) 18
In re Crivello, 134 F.3d 831 (7th Cir.1998) 11
In re Intermagnetics America, Inc., 926 F.2d 912, 916 (9th Cir. 1991). 11
In re Murchison, 349 U.S. 133, 136 (1955) 10
Iowa v. Illinois, 151 U.S. 238 (1894).... 8, 14, 15, 19, 20, 22, 23
Jason Aaron Boling v. Roy Romer, No.96-1115 (10th.Cir.1996) 19
Johnson v. Bechtel Assoc. Pro., 801 F.2d 412, 416 (D.C.Cir.1986).... 7
Leone v. Aetna Cas. & Surety Co., 599 F.2d 566, 567 (3rd Cir.1979). ..23
Liteky v. U.S., 114 S. Ct. 1147, 1155 (1994).... 10, 26
Margoles v. Johns, 660 F.2d 291, 296 (7th Cir. 1981), cert. denied,
455 U.S. 909, 71 L. Ed. 2d 447, 102 S. Ct. 1256 (1982).... 10
Matter of Norton, 128 N.J. 520, 539 (1992).... 12
Mathews v. Eldridge, 424 U.S. 319, 333 (1976)).... 13, 14, 24
McCoy v. Court of Appeals of Wisconsin, 486 U.S. 429, 438 (1988.... 11
Mullane v. Central Hanover B. & T. Co., 339 U.S. 306, 314 (1950)). .20
Newark Branch, N.A.A.C.P. v. Harrison, 907 F.2d 1408,
1416-17 (3d Cir. 1990) 6, 17
Nix v. Whiteside, 475 U.S. 157, 170 n.6 (1986).... 12
Offutt v. U.S., 348 U.S. 11, 14 (1954)).... 10
Orndoff v. U.S.I.R.S., 26 F.3d 131 (9th.Cir.1994)). 21
Oscar v. Univ. Students Co-op Assn., 965 F.2d 783, 785 (9th.Cir.) 19
Parks v. Hargett, No. 98-7068 (10th. Cir.1999) 19
Pensiero v. Robert L. Lingle, 847 F.2d 90 (3d.Cir.1988) 17
Perkins v. Standard Oil, 487 F.2d 672, 674 (9th Cir. 1973).... 7
Piedmont & N. Ry. Co. v. U.S., 280 U.S. 469, 476 (1930)(.... 17
Pumphrey v. K.W. Thompson Tool Co., Nos. 94-35281,
94-35282 (9th Cir.1995) 12, 18
Rita Kernan v. One Washington Park Urban, 154 N.J. 437, 464 (1998).
.... 12
Robinson, 806 F.2d at 450 (3rd Cir.1986) 9
Salve Regina College v. Russell, 499 U.S. 225, 237-38 (1991)). 20
Schwartz v. U.S., 976 F.2d 213, 217 (4th.Cir. 1992).... 16, 25
Spies v. U.S., 317 U.S. 492, 499 (1943). 11, 19
U.S. v. Beard, 913 F.2d 193 (5th Cir.1990) 11
U.S. v. Bertoli, 40 F.3d 1384 (3d.Cir.1994)). 25, 26
U.S. v. California, 507 U.S. 746, 756 (1993) 17
U.S. v. Olano, 507 U.S. 725 (1993)).... 5
U.S. v. Page, 828 F.2d 1476 (10th Cir.1987). 9
U.S. v. Retos, 25 F.3d 1220, 1228 (3d.Cir.1994)).... 5
U.S. v. Russell, 134 F.3d 171 (3d.Cir.1998). 5
U.S. v. Salameh, 152 F.3d 88 (2d Cir.1998).... 4, 21

Table of Authorities

U.S. v. United Mine Workers, 330 U.S. 258, 292 n. 57 (1947)) 16
U.S. v. Vontsteen, 950 F.2d 1086 (5th Cir.1992) 5, 18
U.S. ex rel. Wilson v. Walker, 109 U.S. 258, 266 (1883)) 15
V.T.A. Inc. v. Airco, Inc., 597 F.2d 220, 224 (10th.Cir.1979)) 15
Valent v. Mitchell, 962 F.2d 288, 299 (3d.Cir. 1992) 18
Vecchione v. Wohlgemuth, 426 F.Supp. 1297, 1307-1310,
aff'd. 558 F.2d 150 (3d.Cir.) 16
Waley v. Johnston, 316 U.S. 101 (1942) 17
White v. Higgins, 116 F.2d 312 (1st Cir. 12/12/1940) 7
White v. White, 886 F.2d 721 (4th.Cir.1989) 19
Withrow v. Larkin, 421 U.S. 35, 47, 43 L. Ed. 2d 712 (1975) 10
Zarnes v. Rhodes, 64 F.3d 285 (7th.Cir.1995) 19

Statutes:

28 U.S.C. § 1254(1) 2
28 U.S.C. 455(a). 3
APA 6

Other Authorities:

54-100L 13, 30
9 Charles Alan Wright & Arthur R. Miller, Fed. Pract. & Proc.,
Sect. 2273 (3d.Ed.1995) 17
T. J. Moore & J. Lucas, Moore's Fed. Pract. P 60.33,
at 515 (2d ed. 1978) 11
11 Wright & Miller, Fed. Pract. & Proc. Sect. 2862 at 198-200 (1973) 16

Rules:

Rule 60(b) 3, 4, 15
RPC 3.3 ..... 12, 14
RPC 8.4 14
Rule 13(3) 2
Rule 29. 4. (a) 2
Rules of ethics 18
Rules of Professional Conduct 12

Official and Unofficial Opinions:

Exh.	Page	Date	Subject
1		May 18, 1999	Denial of the motion to Clarify.
2		Apr. 29, 1999	Denial of the motion to Recall
A	1	Apr. 23, 1998	Denial of Petition for Rehearing
B	2-3	Feb. 26, 1998	Appellate Court Judgment
C	4-6	Feb. 26, 1998	Appellate Opinion
D	8-26	Aug. 12, 1997	District Court Opinion/Order
	7	Oct. 7, 1996	Denial of Petition for Certiorari
E	27	May 13, 1996	Denial of Petition for Rehearing
F	28	Mar. 26, 1996	Affirmation of Orders
G	29-31	Aug. 24, 1995	Partial summary judgment
H	32-34	June 19, 1995	Order on Re-argument
I	35-36	May 11, 1995	Dismissal without prejudice.
J	37-43	Mar. 27, 1995	District Court opinion

Basis for Jurisdiction:

Orders to be Reviewed

Apr. 29, 1999 Denial of the motion to Recall

May 18, 1999 Denial of the motion to Clarify.

Jurisdictional Authority

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). Rule 13(3) also provides for a review of orders. Calderon v. Thompson, 118 S. Ct. 1489, 1498 (1998) ("[T]he courts of appeals are recognized to have an inherent power to recall their mandates, subject to review for an abuse of discretion."). As quoted in Graham v. Johnson, No. 99-22014 (5th Cir. 02/25/1999).

Service on Solicitor General

Petitioner served a copy of this petition on the Solicitor General of the U.S. pursuant to Rule 29. 4. (a).

Constitutional Provisions and Statutes Involved:

The panel refused to read the complaint in the appeal and the motion to recall in violation of the Due Process Clause of the Fourteenth Amendment, which requires recalling the mandate, vacation, other appropriate relief, and recussal. 28 U.S.C. 455(a).

Review For Abuse of Discretion:

The motion to recall the mandate was denied. It reviewed every issue affirmed by the panel for plain error. The recall would be followed by a rule 60(b) action if necessary. The issues were;

1. Res Judicata in EPA's favor was based on the August 1995 order, which remains void. Refusing to recall the mandate and not vacating this void order was an abuse of discretion.

2. The panel affirmed a statute of limitations bar after refusing to read tolling allegations pursuant to a cited Supreme Court ruling. So its refusal to read those allegations in the motion to recall continues to deprive petitioner of the required reviewed.

3. Res Judicata and the sanction was achieved by a fraud on the courts by Rockaway's attorney, and the panel's refusal to read the complaint pursuant to cited standards, since the allegations are unrelated to the panel's basis for affirmation.

The panel refused to read the complaint in the motion to recall pursuant to standards of review ignored in the appellate brief. So, it continues to avoid determining if the district court abused its discretion by dismissing for failure to state a claim. The panel also refused to recall a void order that would end the last obstacle to full reinstatement. Moreover, the panel's refusal to recall the mandate prejudices any Rule 60(b) action and proves bias by the panel based on its action in the appeal and this motion.

The issues in the motion were issues of law. So, petitioner cited the following authority to compel the panel to decide these issues. Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 714 (1986). The panel abused its discretion by denying the motion to recall and by not deciding issues of law.

"To satisfy this "extremely difficult burden, of showing an abuse of discretion, an appellant must demonstrate that the denial of the motion caused substantial prejudice," Casamento, 887 F.2d at 1149-50 . . . that is, "prejudice so great as to deny him a fair trial," Cardascia, 951 F.2d at 482. "If the denial of the motion causes some prejudice, but less than substantial prejudice, we are not apt to reverse." Casamento, 887 F.2d at 1150." U.S. v. Salameh, 152 F.3d 88 (2d Cir.1998).

Summary of the Grounds Given to Recall the Mandate:

Petitioner moved to recall the mandate, vacate the August 95 order and other relief. The grounds were as follows;

1) Mr. Higgins perpetrated a fraud on both courts.

2) The affirmed August 1995 order remains void in three ways.

3) The following errors [1] by the panel resulted in substantial prejudice, thus warranting recall. Refusal to correct errors in the motion to recall proves the panel was biased during the appeal;

a) A panel must apply standards of review to each issue. U.S. v. Vontsteen, 950 F.2d 1086 (5th Cir.1992). None were applied to the review of the complaint (Exh. C), though they were cited in the appellate brief, and pointed out in the motion to recall.

b) Standards of review were cited (Exh. M, p.87), which required reading the complaint, accepting its allegations as true, and determining if the district court abused its discretion. Refusing to read the complaint denied petitioner the review called for by the authorities cited, again denying petitioner due process.

---

[1] "For there to be plain error, there must be an "error" that is "plain" and that "affects substantial rights." U.S. v. Retos, 25 F.3d 1220, 1228 (3d Cir. 1994) (quoting U.S. v. Olano, 507 U.S. 725 (1993)). A deviation from a legal rule is "error." Id. at 733. A "plain error is one which is "clear" or "obvious." Id. at 734." U.S. v. Russell, 134 F.3d 171 (3d Cir. 01/16/1998).

c) "The principle is well-settled in this circuit that an order dismissing a complaint without prejudice is not a final and appealable order, unless the plaintiff no longer can amend the complaint because, for example, the statute of limitations has run." Newark Branch, N.A.A.C.P. v. Harrison, 907 F.2d 1408, 1416-17 (3d Cir. 1990). The court's 1997 opinion states it granted summary judgment in August 95 though it barred the APA claim on statute of limitations grounds thus denying petitioner the right to be heard. That bar made the May 95 order appealable (Exh.I).

d) The panel disregarded this due process violation in the 1997 opinion (Exh. D, p.12). The admitted denial of due process renders the August 1995 order void, thus warranting its recall.

e) Petitioner appealed the August 1995 summary judgment ruling since the statute of limitations bar was not in any order to be appealed. The district court admits imposing that bar, so it had no jurisdiction to grant summary judgment. So, the August 1995 order is void and petitioner was denied the right to appeal that bar. So, petitioner "**should not suffer the adverse res judicata effects of a district court judgment when it is denied the benefit of appellate review through no fault of its own.**" Assoc. Gen. Cont. of Conn. Inc. v. New Haven, 41 F.3d 62 (2d Cir.1994).

Authorities Cited in the Motion to Support Recall:

The authority of Court of Appeals to recall its mandate is clear. Aerojet-General Corp. v. American Arbitration Assoc., 478 F.2d 248, 254 (9th Cir.1973). While the authority is not conferred by statute, id., it exists as part of the court's power to protect the integrity of its own processes. Perkins v. Standard Oil, 487 F.2d 672, 674 (9th Cir. 1973), citing Briggs v. Pennsylvania R.R. Co., 334 U.S. 304, 306, 92 L. Ed. 1403, 68 S. Ct. 1039 (1948). "We recognize that an **attorney's deliberate attempt to mislead the court** may be such a fraud as will permit the reopening of a judgment. Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 245-46, (1944)." As quoted in Bandai America Inc. v. Bally Midway Mfg. Co., 775 F.2d 70 (3rd Cir.1985). "**When the alleged error was fundamental and resulted in a highly prejudicial error do *exceptional* circumstances exist.**" Continental Casualty Co. v. Dominick D'andrea Inc., 150 F.3d 245 (3d Cir. 1998). This power should be exercised in ***exceptional* circumstances**. Johnson v. Bechtel Assoc. Pro. Corp., 801 F.2d 412, 416 (D.C.Cir.1986). "The power exists to reopen the points of law already decided . in a **clear instance of previous error**, to prevent a manifest injustice." White v. Higgins, 116 F.2d 312

(1st Cir. 12/12/1940). "Exceptional circumstances in order to override the strong policy of repose . . the recall of an appellate mandate to avoid injustice is . a deeply rooted equity jurisprudence . if a case involves the kind of injustice that would support an independent suit in the trial court, but presents an instance where action is needed from an appellate court, which cannot entertain a new "independent" action, the remedy of recall of mandate may well be appropriate" Greater Boston TV Corp., 463 F.2d 268 (D.C. Cir.1971).

The above authorities are clear and to the point. So, the August 1995 order should have been recalled since the 1997 district court opinion admits barring petitioner's right to be heard then entered summary judgment in EPA's favor. The three remaining issues would have been recalled had the panel read the complaint, accepted its allegations as true, and reviewed for an abuse of discretion pursuant to the standards cited in the appellate brief (Exh. M). However, the panel affirmed without considering the allegations, thus violating Haines v. Kerner, 404 U.S. 519, 520. So, petitioner was denied a meaningful opportunity to be heard in accordance with the authorities cited in violation of due process. Iowa v. Illinois, 151 U.S. 238 (1894).

Authorities Cited on Extrajudicial Bias by the Panel:

Petitioner cited authorities that require correction of errors to avoid a manifest injustice. And also cited the following authorities to show finality in the face of errors would prove bias.

"Although we have had no occasion to discuss the abuse standard as applied to actions of a court of appeals as distinct from those of a trial court, there is no reason to suppose the criterion should be affected merely because it is an appellate court . ." . Calderon v. Thompson, 118 S. Ct. 1489, 1498 (1998). Webster's Ninth New Collegiate Dictionary defines "extrajudicial" as "done in contravention of due process of law." **"Such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party."** Davis v. Bd. of Sch. Comm. of Mobile County, 517 F.2d 1044, 1051 (5th Cir. 1975), cert. denied, 425 U.S. 944, 48 L. Ed. 2d 188, 96 S. Ct. 1685 (1976). As quoted in U.S. v. Page, 828 F.2d 1476 (10th Cir.1987). This Court held **"evidence of a generalized bias may be sufficient to establish a constitutional violation, but only in the most extreme of cases."** Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986)." As quoted in Robinson, 806 F.2d @ 450 (3rd Cir.1986). "Bias or prejudice connotes an unfavorable opinion that is somehow

"wrongful or inappropriate," because it is undeserved". Liteky v. U.S., 114 S. Ct. 1147, 1155 (1994)." As quoted in Groden v. Random House Inc., 61 F.3d 1045 (2d Cir.1995). See, e.g., Margoles v. Johns, 660 F.2d 291, 296 (7th Cir. 1981), cert. denied, 455 U.S. 909, 71 L. Ed. 2d 447, 102 S. Ct. 1256 (1982) ("A litigant is denied due process if he is in fact treated unfairly"). "Not only is a biased decision maker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'" Id. (quoting In re Murchison, 349 U.S. 133, 136 (1955))." As quoted in Hall v. Marion Sch. Dist. No.2, 31 F.3d 183 (4th Cir.1994). The Supreme Court has recognized, however, that the likelihood of bias or appearance of bias can, in certain circumstances, be so substantial as to create a conclusive presumption of actual bias. See, e.g., Withrow v. Larkin, 421 U.S. 35, 47, 43 L. Ed. 2d 712, 95 S. Ct. 1456 (1975) (there are cases where "experience teaches that the probability of actual prejudice on the part of the judge . . is too high to be constitutionally tolerable"). See also In re Murchison, 349 U.S. 133, 136 (1955) ("to perform its high function in the best way 'justice must satisfy the appearance of justice'") (quoting Offutt v. U.S., 348 U.S. 11, 14 (1954)). My certification (Exh. Q) outlines many biased acts.

Fraud Upon Appellate Court or Due Process Violation:

Mr. Higgins' failure to disclose a material fact to the panel amounts to a fraud upon the court. "To constitute a fraud on the court, alleged misconduct must harm the integrity of the judicial process and **hamper the administration of justice**." Alexander v. Robertson, 882 F.2d 421, 424 (9th Cir. 1989) (quoting T. J. Moore & J. Lucas, Moore's Fed. Pract. P 60.33, at 515 (2d ed. 1978)); see also In re Intermagnetics America, Inc., 926 F.2d 912, 916 (9th Cir. 1991). "Failure to disclose . . . constituted a fraud upon the court." U.S. v. Beard, 913 F.2d 193 (5th Cir.1990). "Court should not fall prey to the professional's *[law firm]* story of confusion, miscommunication, or negligence. We believe a . . court should punish a **willful failure** to disclose . . . as an attempt to put forth a fraud upon the court. In re Crivello, 134 F.3d 831 (7th Cir.1998). '**Willful attempt**' can be inferred from "any conduct, the likely effect of which would be to mislead or **conceal**," Spies v. U.S., 317 U.S. 492, 499 (1943). "Appellate lawyer must master the trial record." McCoy v. Court of Appeals of Wisconsin, 486 U.S. 429, 438 (1988). "Rules of ethics already prescribe . . attorney **must disclose facts** and law contrary to his or her client's interests." *Id.*@ 440-41, n.14. "No independent

action would be entertained for relief from a judgment after one year except for "fraud on the court" as distinguished from fraud on a party." Sylvia Averbach v. Rival Mfg. Co., 809 F.2d 1016, 1020 (3d.Cir.1987). "Rules of Professional Conduct provide federal courts with a guide." Nix v. Whiteside, 475 U.S. 157, 170 n.6 (1986); Pumphrey v. K.W. Thompson Tool Co., Nos. 94-35281, 94-35282 (9th Cir.1995) (a licensed attorney, "is aware of the necessity for compliance with the rules of discovery and the rules of professional responsibility"). As a New Jersey attorney, Mr. Higgins concealment of material facts violated the rules;

> Attorneys "stood silent as the miscarriage of justice occurred before [their] eyes. Both **lawyers knew that the judge had been misled** or that **he was making a colossal mistake due to his lack of accurate information about the case**. Even though his client was the beneficiary of this miscarriage, Norton must have known that he could not ethically accept a victory won by these means." Matter of Norton, 128 N.J. 520, 539 (1992).

> "In commenting on RPC 3.3, the American Bar Association states, "[t]here are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.
>
> As adopted in New Jersey, RPC 3.3 exceeds the requirements of disclosure imposed by the ABA version. **The New Jersey version of RPC 3.3 mandates that a lawyer shall not knowingly "fail to disclose to the tribunal a material fact with knowledge that the tribunal may tend to be misled by such failure."** Rita Kernan v. One Washington Park Urban, 154 N.J. 437, 464 (1998).

The foregoing outlines the law on this type of fraud. Else, failure to disclose a material fact is a due process violation; **"the court stated that the failure to disclose material information is a due process violation "irrespective of the good or bad faith of the prosecution.""** Brady v. Maryland, 373 U.S. 83, 86 (1963).

Mr. Higgins read the complaint and had a duty to master the trial record for appeal. So, he knew Claim Nine against Rockaway challenged ordinance 54-100L, and Claim Ten alleged an illegal assessment (Exh. K, p.58-60). Upon reading the opinion that follows he knew the panel made a colossal error by affirming res judicata and the sanction based on the 1985 purchase since it is not related to either claim. Nor was that opinion listed in the March 95 ruling (Exh. J, p. 41) that he used to prepare the May 95 dismissal without prejudice (Exh. I). So, he knew petitioner was denied a meaningful review. Mathews v. Eldridge, 424 U.S. 319, 333 (1976). So, concealing allegations that the panel overlooked obstructed the administration of justice;

> **He litigated the merits of his 1985 purchase of the plot of land in New Jersey state court**. As the 1993 opinion of the New Jersey Appellate Division shows, Fernandes has actually litigated his claims on the merits in the state courts. **He cannot sue once more concerning this same transaction or occurrence.** (Panel's Opinion, Exh. C)

Mr. Higgins' conduct violated the following Rules;

RPC 3.3(a) A lawyer shall not knowingly: (5) Fail to disclose to the tribunal a material fact with knowledge that the tribunal may tend to be misled by such failure.

RPC 8.4 Misconduct: It is professional misconduct for a lawyer to: (d) Engage in conduct that is prejudicial to the administration of justice.

Petitioner proved the panel's opinion was not related to the allegations in the complaint. So, refusing to read the complaint pursuant to *Haines v. Kerner*, as cited in the appellate brief denied petitioner the required review. Iowa v. Illinois, 151 U.S. 238 (1894). ("No order can stand in respect of which full opportunity to be heard has not been afforded"). The panel's refusal to consider the fraud also denied petitioner a meaningful review. **"The fundamental requirement of due process is the opportunity to be heard `at a meaningful time and in a meaningful manner.'"** Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). Refusing to consider the fraud and its continued refusal to read the complaint pursuant to cited standards proves the panel purposely refused to address the district court's denial of due process.

The August 95 Order is Void in Three Ways:

The panel disregarded a denial of due process in the district court's August 12, 1997 opinion (Exh. D, p.16-17). That opinion states the following about its March 1995 bench ruling, **"It also found the challenge to the EPA grant condition time-barred by a six year statute of limitations imposed by the APA."** It went on to state **"by Letter Order dated August 24, 1995, the Court granted summary judgment in favor of the United States, finding the EPA had not acted arbitrarily and capriciously when it denied Fernandes' waiver request."** From this reading the panel knew that summary judgment on the APA claim (Exh. G, p.33) in August of 1995 was inconsistent with due process, since petitioner was denied the opportunity to be heard. Iowa v. Illinois, 151 U.S. 238 (1894). The district court admits barring the APA claim thus refusing to consider that claim. Then grants summary judgment on the claim it barred. V.T.A., Inc. v. Airco, Inc., 597 F.2d 220, 224 (10th Cir. 1979) (judgment is void under Rule 60(b)(4) if the rendering court was powerless to enter it); U.S. ex rel. Wilson v. Walker, 109 U.S. 258, 266 (1883) ("not within the powers granted to it by the law"). "A judgment is not void merely because it is erroneous. It is void only if the court that

rendered it lacked jurisdiction of the subject matter, or of the parties, **or if it acted in a manner inconsistent with due process of law.**" Schwartz v. U.S., 976 F.2d 213, 217 (4th Cir. 1992) (quoting 11 Wright & Miller, Federal Pract. and Proc. § 2862 at 198-200 (1973)). A judgment remains void until such time jurisdiction is finally determined to exist, and, by virtue of the federal courts' "jurisdiction to determine jurisdiction," is elevated by its "bootstraps" to the status of a valid judgment, see U.S. v. United Mine Workers, 330 U.S 258, 292 n.57 (1947); Vecchione v. Wohlgemuth, 426 F. Supp. 1297, 1307-1310 (E.D. Pa.) (describes "bootstrap" principle), aff'd, 558 F.2d 150 (3d Cir.), cert. denied, 434 U.S. 943 (1977). A panel can sua sponte reverse orders that result in a manifest injustice even when law of the case is involved. Dilaura v. Power Auth., 982 F.2d 73 (2nd Cir.1992). See Christianson, 486 U.S. at 817 (quoting Ariz. v. Cal., 460 U.S. at 618 n.8).

The August 1995 order is also void because petitioner filed a notice of appeal on June 22, 1995 (Exh. L), three days after the court denied reconsideration (Exh. H), and two months before its August 1995 order (Exh. G). That notice denied the district court jurisdiction to enter its August 95 order;

> "As a general rule, the filing of a notice of appeal divests the district court of jurisdiction over the case pending disposition of the appeal. Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58, 74 L. Ed. 2d 225, 103 S. Ct. 400 (1982) (per curiam)" Mary Ann Pensiero v. Robert L. Lingle, 847 F.2d 90 (3rd Cir.1988).

Third, the May 1995 order ended the litigation. U.S. v. California, 507 U.S. 746, 756 (1993); see also 9 Charles Alan Wright & Arthur R. Miller, Fed. Pract. and Proc. § 2273 (3d ed. 1995) (a dismissal without prejudice is "a final termination of the present action"); Deutsch v. U.S., 67 F.3d 1080, 1083 (3d Cir. 1995). The district court's admitted statute of limitations ruling ended jurisdiction. Newark Branch, N.A.A.C.P. v. Harrison, supra. So, the lower court knew it had no jurisdiction to enter its August 1995 order. Waley v. Johnston, 316 U.S. 101, 104-5 (1942); Piedmont & N. Ry. Co. v. U.S., 280 U.S. 469, 476 (1930) (res judicata does not apply when court lacked jurisdiction).

Since the foregoing proves the panel overlooked a due process violation in the 1997 district court opinion and that the August 1995 order remains void in two other ways, the panel's refusal to recall a void order proves bias. The August 1995 void order was never raised by its bootstrap in order to justify not recalling the mandate and not vacating that order.

Refusal to Read Complaint Denied Due Process:

"An appellate court must apply some standard of review to every issue it considers . . if neither party suggests the appropriate standard, the reviewing court must determine the proper standard on its own." U.S. v. Vontsteen, supra.; Gulf Oil Corp. v. Comm. of I.R.S., 914 F.2d 396 (3rd Cir. 1990) "When the alleged error was fundamental and resulted in a highly prejudicial error do exceptional circumstances exist". Continental Casualty Co. v. Dominick D'andrea Inc., 150 F.3d 245 (3d Cir. 1998). Page 5 of the appellate brief (Exh. M), shows petitioner presented standards of review that required reading the complaint. Haines v. Kerner, 404 U.S. 519 (1972). Accepting its allegations and exhibits as true. ALA. Inc. v. CCAIR. Inc., 29 F.3d 855 (C.A.3 1994). Determining if the district court abused its discretion. Inter. Union. UAW v. Mack Trucks. Inc., 820 F.2d 91, 95 (3d.Cir.1987); Valenti v. Mitchell, 962 F.2d 288, 299 (3d. Cir. 1992). The panel disregarded these standards, and failed to state the standard it did apply in its opinion (Exh. C). The panel relied on the district court opinion after petitioner specifically argued that it failed to read the complaint (Exh. N). Appellant presented these facts in the motion to recall proving the panel should correct

its error by applying the cited standards. So, its continued refusal to provide the review required by *Haines v. Kerner, supra* is a continued denial of the opportunity to consider the allegations, instead of the district court opinion. Iowa v. Illinois, supra.

"The district court is obligated to construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519 (1972) (inartfully pleaded allegations of the pro se complaint are held to less stringent standards than formal pleadings drafted by lawyers)." As quoted in White v. White, 886 F.2d 721 (4th Cir.1989). See; Parks v. Hargett, No. 98-7068 (10th Cir.1999). "We review the district court's decision de novo and liberally construe plaintiff's pleadings. Haines v. Kerner." As quoted in Jason Aaron Boling v. Roy Romer, No. 96-1115 (10th Cir.1996). "We review de novo the district court's dismissal for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6)." Oscar v. Univ. Students Co-op. Ass'n, 965 F.2d 783, 785 (9th Cir.) (en banc), cert. denied, 113 S. Ct. 655 (1992). **"we must construe Zarnes's complaint liberally in determining whether the court properly dismissed these claims."** Zarnes v. Rhodes, 64 F.3d 285 (7th Cir.1995). **"We cannot say with assurance that petitioner can prove no set of facts in support of his claim entitling him to relief. Haines v.**

Kerner . . . accordingly, the Court of Appeals should have reversed the dismissal of this claim and remanded for further proceedings." As quoted in Hughes v. Rowe et al, 449 U.S. 5, 101 S. Ct. 173, 66 L. Ed. 2d 163, 49 U.S.L.W. 3346 (1980).

This line of cases requires the same review in the district, appellate, and Supreme Courts. So, the required review for dismissed pro se complaints is de novo. Salve Regina College v. Russell, 499 U.S. 225, 237-38 (1991) ("[w]hen de novo review is compelled, no form of appellate deference is acceptable.")." The panel's refusal to review de novo denied appellant the opportunity to prove the district court abused its discretion since its findings are not related to the allegations, proving it failed to read it. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). "No order can stand in respect of which full opportunity to be heard has not been afforded." Iowa v. Illinois, 151 U.S. 238 (1894).

The panel reviewed the district court's sanction ruling pursuant to the same standard in the following holding which first read the complaint to construe pro se pleadings:

> "We review the district court's imposition of Rule 11 sanctions for abuse of discretion. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990); U.S. v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992) . . **While the district court may impose Rule 11 sanctions against a**

pro se litigant for filing a frivolous claim, the court must construe pro se pleadings liberally. See Haines v. Kerner, 404 U.S. 519, 520 (1972); Cook v. Peter Kiewit Sons Co., 775 F.2d 1030, 1037 & n.13 (9th Cir. 1985). Orndoff v. U.S.I.R.S., 26 F.3d 131 (9th Cir.1994)

Appellant cited a standard that required reading the complaint and pointed out the lower court's failure to read it (Exh. N). Hence, the panel's refusal to do so on appeal and in the motion to recall caused petitioner substantial prejudice. Casamento, 887 F.2d at 1150." U.S. v. Salameh, 152 F.3d 88 (2d Cir.1998).

Judge Becker's opinion states;

"The order of the district court will be affirmed. As to the merits of Fernandes' claim, his claims are barred by res judicata. **He litigated the merits of his 1985 purchase of the plot of land in New Jersey state court. As the 1993 opinion of the New Jersey Appellate Division shows, Fernandes has actually litigated his claims on the merits in the state courts. He cannot sue once more concerning this same transaction or occurrence.** See, e.g., Board of Trustees V. Centra, Inc., 983 F.2d 495, 504 (3d Cir. 1992)."

"Given the facts of this case, the district court's sanctions are not an abuse of discretion. Fernandes has been pursuing claims against Rockaway for almost a full decade. **He has appealed the clearly merited dismissals of his claims all the way to the United States Supreme Court twice, and yet still has come back for more.** . . The order of the district court will be affirmed."

This opinion affirmed the sanction by relying on the opinion that refers to the 1985 purchase (Exh. C). Reading the pleadings pursuant to *Haines v. Kerner* would have disclosed

Claim Nine against Rockaway challenges ordinance 54-100L, and Claim Ten alleges an illegal assessment (Exh. K, p.58-60). Both claims are clearly unrelated to the 1985 purchase and the district court's 1995 bench ruling (Exh. J, p.41) which outlines the claims that would be res judicata. Petitioner further certified the allegations had nothing to do with the claims in that ruling. So refusing to correct substantial prejudice perpetuated the following injustice in the 1997 district court opinion (Exh. D, p. 26).

> "This Court ruled in 1995 that the claims against Rockaway were barred by res judicata. No matter how plaintiff restates or restyles his bases for relief, the issues and the claims are based upon the same facts and have been resolved against him." (Exh. D, p. 26) (Exh. J, p.41)

The district court clearly relied on its 1995 ruling, which does not list the allegations in the complaint proving it failed to read both before finding res judicata in Rockaway's favor and imposing its sanction on petitioner. So, petitioner proved the panel's opinion was so blatantly incorrect, that its refusal to recall res judicata and the sanction amounts to substantial prejudice and a deliberate denial of due process. Iowa v. Illinois, 151 U.S. 238 (1894). It clearly proves the panel was biased against petitioner and that it acted in support of the district court's original denial of due process, which indicates a conspiracy to deny pro se litigant's due process. My certification (Exh. Q) addresses this and numerous other acts that prove a deliberate denial of due process.

Substantial Prejudice on State of Limitations Issue:

The panel's opinion as follows (Exh. C) is inconsistent with the allegations, proving its refusal to read the complaint pursuant to cited standards of review caused a "manifest injustice" and also denied petitioner a fair opportunity to be heard.

> **"Further, Fernandes has filed this action in 1997, between 8 and 12 years after the relevant events. His actions are barred by the applicable statutes of limitations."** (emphasis added)

This opinion as compared to one allegation that alleges tolling doctrines proves the panel erred (Complaint, Exh. K, p.57);

> **CLAIM EIGHT – Administrator / Regional Administrator Failed to Comply with the CWA.**
>
> **13. The statute of limitations is not a bar to this action, since the EPA has waived its right to rely on the statute of limitations, not withstanding the doctrines of estoppel, equitable tolling, fraudulent concealment and continuing violation also apply to all the defendants.**

The panel's refusal to comply with *Haines v. Kerner, supra.* (Exh. M) in the motion to recall continues to deny a meaningful opportunity to be heard, Iowa v. Illinois, 151 U.S. 238 (1894), just so the panel can avoid the following duty:

> "[t]he question to be answered thus becomes whether the assertions of the complaint, given the required broad sweep would permit adduction of proofs that would provide a recognized legal basis for avoiding the statutory bar." Leone v. Aetna Casualty, 599 F.2d 566, 567 (3rd Cir.1979).

"when the alleged error was fundamental and resulted in a highly prejudicial error do exceptional circumstances exist"." Continental Casualty Co. v. Dominick D'andrea Inc., 150 F.3d 245 (3d Cir. 1998). Disregarding a Supreme Court ruling that requires reading the complaint is an exceptional circumstance.

This was not meant to replace an appeal, since petitioner cited *Haines v. Kerner* in his appellate brief (Exh. M). It merely reviewed the facts to show the panel's failure to read the complaint substantially prejudiced petitioner's right to be heard. The following argument shows disregarding standards of review in the appeal that require reading the complaint, accepting the allegations as true, and reviewing for an abuse of discretion was a de novo standard of review, not a deferential one. Since the dismissal was based on the allegations in the complaint, the panel's refusal to read the complaint denied the meaningful review required by *Haines v. Kerner, supra.* in the appeal and continues to deny that review in the motion to recall. **"The fundamental requirement of due process is the opportunity to be heard `at a meaningful time and in a meaningful manner.'"** Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

Grounds for the Accepting Certification as Proof of Bias:

"In order to prevail on a motion to disqualify a judge, a party must file a timely and sufficient affidavit showing extrajudicial bias or prejudice." 28 U.S.C. § 144; Thomassen, 835 F.2d at 732. "A favorable or unfavorable predisposition can . . . deserve to be characterized as 'bias' or 'prejudice'. U.S. v. Bertoli, 40 F.3d 1384 (3d Cir. 1994). "A judgment is not void merely because it is erroneous. It is void only if the court that rendered it . . **acted in a manner inconsistent with due process of law**." Schwartz v. U.S., 976 F.2d 213, 217 (4th Cir. 1992) (quoting 11 Wright & Miller, Federal Pract. and Proc. § 2862 at 198-200 (1973)). "Although we have had no occasion to discuss the abuse standard as applied to actions of a court of appeals as distinct from those of a trial court, there is no reason to suppose the criterion should be affected merely because it is an appellate court . ." . Calderon v. Thompson, 118 S. Ct. 1489, 1498 (1998). Based on these authorities, I am submitting my certification (Exh. Q) to show the panel, and Judge Walls decided issues in this and the former case with a predisposition to deny me due process which requires recalling the mandate, vacating orders, and other appropriate relief including disqualification.

Recusal of the Panel and Judge Walls:

The foregoing proves the denial of the motion to recall was an abuse of discretion. Moreover, the conduct outlined in the certification (exh. Q), goes toward proving the district and appellate court's conduct supports the inference that they have a custom of avoiding substantial allegations, to dismiss and affirming the dismissal for failure to state a claim by avoiding standards of review that would prove the initial failure to read it.

The foregoing supports recusal because the decisions of the district court in 1995 and 1997, as well as the panel's actions on appeal and the motion to recall displays, **"a deep-seated favoritism or antagonism that would make fair judgment impossible."** U.S. v. Bertoli, 40 F.3d 1384 (3d.Cir.1994). "Section 455(a) . . addresses the appearance of partiality, guaranteeing not only that a partisan judge will not sit, but also that no reasonable person will have that suspicion. See Liljeberg, supra, at 860." Liteky v. U.S., 114 S. Ct. 1147 (1994).

To claim bias on the basis of review errors would have been premature. But, the panel's handling of the motion to recall together with its conduct on appeal as outlined in my certification (Exh. Q) shows the panel's refusal to correct proves bias in both proceedings.

Conclusions:

The panel affirmed four issues (Exh. C) by overlooking standards of review that required reading the complaint, accepting its allegations as true, and determining if the district court abused its discretion, as well as overlooking an admitted denial of due process in the district court's 1997 opinion (Exh. D).

To deny the motion to recall after being made aware of these oversights is an abuse of discretion. However, the way the panel and district courts conducted themselves on the issues outlined in my certification (Exh. Q) clearly proves they deliberately overlooked issues in order to deny due process.

I trust this Court will review my certification in order to decide whether the actions of both courts was inconsistent with the way each issue should have been handled so as to make its oversights appear deliberate. And that the panel's initial oversights and its subsequent refusal to correct them is the final manifestation of its denial of due process so as to warrant this Court granting the appropriate relief for extrajudicial bias or an abuse of discretion.

Table of Exhibits

Exh.	Page	Date	Subject
1	1- 2	May 7, 1999	Denied Motion for Clarify
2	3- 3	Apr. 23, 1999	Denied Motion to Recall
A	4- 4	Apr. 23, 1998	Denied Petition for Rehearing
B	5- 6	Feb. 26, 1998	Appellate Court Judgment
C	7- 9	Feb. 26, 1998	Appellate Opinion
	10-10	Oct. 7, 1996	Denied Petition for Certiorari
D	11-29	Aug. 12, 1997	District Court Opinion/Order
E	30-30	May 13, 1996	Denied Petition for Rehearing
F	31-31	Mar. 26, 1996	Affirmation of Orders
G	32-34	Aug. 24, 1995	Partial summary judgment
H	35-36	June 19, 1995	Order on Reargument
I	37-38	May 11, 1995	Dismissal without prejudice.
J	39-45	Mar. 27, 1995	District Court bench ruling
K	46-65	Feb. 27, 1997	Amended Complaint
a	66-70	Apr. 23, 1979	EPA Memo
b	71-77	May 25, 1979	EPA Memo on Conspiracy
c	78-79	July 11, 1980	EPA Memo Commend.Consp.
d	80-82	Oct. 21, 1988	Wetlands Exemption Letter
e	83-84	Apr. 1, 1989	NJDEP Recommendation
f	85-86	May 5, 1989	Letter Denying Grant Waiver
L	87-87	Jun. 22, 1995	Notice of Appeal
M	88-89		From appellate brief
N	90-91		From appellate brief
O	92-93		From appellate brief
P	94-95		From appellate brief
Q	96-107	Jun. 20, 1999	Petitioner's Certification

EXH. 1 MAY 18, 1999 Denied Motion for Clarification

UNITED STATES COIJRT OF APPEALS FOR THE THIRD CIRCUIT

May 7, 1999

No. 97-5579

Re: Fernandes v. Rockaway Township

Present: Becker, Chief Judge, Alito and Garth, Circuit Judges.

1. Motion filed by Appellant for Clarification or in the Alternative Reconsideration of the Court's Order dated 4/29/99.

2. Any response to the above motion is due 5/17/99 and will be forward upon receipt.

*A copy of the Court's 4/29/99 order attached for the Court's information Only.

Donna L. Lee
Case Manager
Direct Dial 597-3137

ORDER

The forgoing motion is denied. All orders entered by the Court in this matter have been authorized by the judges of the panel and comply fully with the Federal Rules of Appellate Procedure, the Local Rules of this Court, and the Internal Operating Procedures of this Court. Additional motions made in this same matter will be deemed vexatious and subject to appropriate sanctions.

By the Court
S/Becker
Circuit Judge

DATED: May 18, 1999

EXH. 2 APRIL 29, 1999 Denied Motion to Recall

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

April 23, 1999

No. 97-5579

Re: Fernandes v. Rockaway Township

Present: Becker, Chief Judge ✔, Alito and Garth, Circuit Judges.

1. Motion filed by Appellant to Recall the Mandate and Other Relief.

2. The Memorandum Opinion and Judgment in this appeal was filed 2/26/98 and a Petition for Rehearing was filed on 3/31/98 An Order denying this petition was filed on 4/23/98 and the mandate was issued on 5/4/98.

3. Any response to the above motion is due 4/27/99, and will be forward upon receipt.

Donna L. Lee
Case Manager
Direct Dial 597-3137

ORDER

The forgoing motion is denied.

By the Court,
S/Becker
Circuit Judge

DATED: APR 29, 1999

EXH. - A April 23, 1998 Denial of Petition for Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 97-5579

NELSON FERNANDES, Appellant

V.

EPA; ADMINISTRATOR OF THE EPA;
REGIONAL ADMINISTRATOR FOR REGION II;
COMMISSIONER OF NJDEP; ROCKAWAY TOWNSHIP
COUNCIL; ATTORNEY GENERAL, Appellee
(D.C. Civ. No. 96-cv-05791)

Present: BECKER, Chief Judge, SLOVITER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, McKEE, RENDELL and GARTH,* Circuit Judges,

SUR PETITION FOR PANEL REHEARING
WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT:

"s/Becker"
Chief Circuit Judge

DATED: APR 23, 1998

EXH. - B Feb. 26, 1998 Appellate Court Judgment

IN THE UNITED STATES COURT OF APPEALS

NO. 97-5579

NELSON FERNANDES, Appellant

V.

EPA; ADMINISTRATOR OF THE EPA;
REGIONAL ADMINISTRATOR FOR REGION II;
COMMISSIONER OF NJDEP; ROCKAWAY TOWNSHIP
COUNCIL; ATTORNEY GENERAL

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civ. No. 96-cv-O5791)
District Judge: Honorable William H. Walls

Submitted Under Third Circuit LAR 34.1(a)
February 13, 1998
Before: BECKER, Chief Judge, ALITO and GARTH,
Circuit Judges.

(Filed Feb. 26 1998)

JUDGMENT

This case came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted on February 13, 1998. On consideration whereof it is now here

ORDERED AND ADJUDGED by this court that the order of the district court of August 12, 1997 be and the same is hereby affirmed.

Costs taxed against appellant.

ATTEST:

"s/P. Douglas Sisk"

Clerk

DATED: Feb. 26, 1998

EXH. - C Feb. 26, 1998 Appellate Opinion

NOT-FOR-PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 97-5579

NELSON FERNANDES,
Appellant

V.

EPA; ADMINISTRATOR OF THE EPA;
REGIONAL ADMINISTRATOR FOR REGION II;
COMMISSIONER OF NJDEP; ROCKAWAY TOWNSHIP
COUNCIL; ATTORNEY GENERAL

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civ. No. 96-cv-05791)
District Judge: Honorable William H. Walls

Submitted Under Third Circuit LAR 34.1(a)
February 13, 1998
Before: BECKER, Chief Judge, ALITO and GARTH,
Circuit Judges.

(Filed Feb. 26, 1998)

MEMORANDUM OPINION

BECKER, Chief Circuit Judge.

The order of the district court will be affirmed. As to the merits of Fernandes' claim, his claims are barred by res judicata.

He litigated the merits of his 1985 purchase of the plot of land in New Jersey state court. As the 1993 opinion of the New Jersey Appellate Division shows, Fernandes has actually litigated his claims on the merits in the state courts. He cannot sue once more concerning this same transaction or occurrence. See, e.g., Board of Trustees V. Centra, Inc., **983 F.2d 495, 504 (3d Cir. 1992).** Similarly, **Fernandes has litigated the 1989 denial of his application for a waiver, as shown in the 1995 opinion of the district court. He lost on the merits, and cannot continue to challenge this occurrence by adding new parties and refiling the action.** Id. **Further, Fernandes has filed this action in 1997, between 8 and 12 years after the relevant events. His actions are barred by the applicable statutes of limitations.**

As to the district court's Rule 11 sanctions, we review for abuse of discretion. Lony v. E.I. DuPont de Nemours & Co., 935 F.2d 604, 615 (3d Cir. 1991). However, this standard may incorporate other standards of review, for the Supreme Court has indicated that a district court "would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Cooter & Gell

v. Hartmarx Corp., 496 U.S. 384, 405 (1990). Given the facts of this case, the district court's sanctions are not an abuse of discretion. Fernandes has been pursuing claims against Rockaway for almost a full decade. He has appealed the clearly merited dismissals of his claims all the way to the United States Supreme Court twice, and yet still has come back for more. The district court did not abuse its discretion in forcing Fernandes to pay a modest amount of attorney's fees, and in enjoinnig him from bringing even more suits arising from these same events. The order of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing opinion of the court.

BY THE COURT:
"S/ Becker"
Chief Circuit Judge

The Supreme Court denied a petition for Certiorari on October 7, 1996 that appellant was unable to find in order to present it in this spot.

EXH. – D August 12, 1997 District Court Opinion & Order

UNITED STATES DISTRICT COURT

District of New Jersey

Chambers of
William H. walls
District Judge

Martin Luther King Jr.
50 Walnut Street
Newark, New Jersey 07101

(201) 645-2564
(201) 645-6467 Fax

NOT FOR PUBLICATION

LETTER ORDER
ORIGINAL ON FILE WITH CLERK OF THE COURT

Nelson Fernandes
9 Fox Run
Denville, New Jersey 07834
Plaintiff pro se

Susan Handler-Menahem
Assistant United States Attorney
United States Attorney's Office
District of New Jersey
970 Broad Street
Newark, New Jersey 07102
Attorney for Federal Defendants

Kim L. Simmons
Environment and Natural Resources Division
Environmental Defense Section
Department of Justice
P.0. Box 23986
Washington, DC 20026-3986
Attorney for Federal Defendants

James J. Higgins
Boyar, Higgins & Suozzo, P.A.
10 Park Place, Suite 415
Morristown, New Jersey 07960
Attorney for Defendant Rockaway
Township Town Council

Re: Fernandes V. EPA, et als. Civil No. 96-5791

Dear Counsel and Litigant:

For the fourth time in seven years, plaintiff Nelson Fernandes ("Fernandes") has brought suit against various parties for the 1989 denial of permission to connect his property in Rockaway Township to the township sewer line. Defendants United States Environmental Protection Agency (the "EPA"), Administrator of the EPA, Administrator of Region II of the EPA, and the Attorney General of the United States (collectively, "the federal defendants") move for dismissal of the Complaint. Defendant Rockaway Township Town Council ("Rockaway") moves for dismissal of the Complaint and also for sanctions against Fernandes under Rule 11 of the Federal Rules of Civil Procedure. Fernandes cross moves for summary judgment. Pursuant to Rule 78 of the Federal Rules of Civil Procedure, the Court decides this matter on the basis of the written submissions of the parties.

Factual Background

On August 6, 1985, Rockaway Township held a public sale of real property by auction. The terms of the public auction were that the property was sold "as is" and that "no representations of any kind are made by the Township of Rockaway as to the

condition, area, or boundaries of the property herein relevant."

Lot 8 was one of the land parcels on which the public bid. A portion of Lot 8 was covered by environmentally sensitive freshwater wetlands. On September 21, 1985, plaintiff won ownership of Lot 8 by bidding $10,000.00. Plaintiff had a title search done at the time of purchase. On November 15, 1985, plaintiff took title to Lot 8 by deed recorded with the Morris County Clerk. Plaintiff later purchased Lot 9, which is adjacent to Lot 8, at a tax sale. He planned to subdivide the two lots and build a single family dwelling and hoped to connect the single family home to the municipal sanitary sewer line that ran adjacent to his lots. However, his application was rejected because of a grant condition imposed by the federal government.

The Rockaway valley Regional Sewer Authority ("RVRSA") operates a sewer system in Morris County, New Jersey. In 1983, the federal government gave RVRSA a grant to fund in part a sanitary sewer system. According to Grant Agreement No. C340389- 04-02, lots within an environmentally sensitive area (such as wetlands) cannot be connected to federally funded sewers without a written waiver from the EPA Regional Administrator. The purpose of the condition is to protect the surrounding wetlands.

Plaintiff's lots are two of approximately 140 lots in the Township which were impacted by the EPA grant condition.

In 1989, at Fernandes' request, the RVRSA submitted a

waiver application to the EPA for Lot 8. The Army Corps of Engineers and the NJDEP determined that Lot 8 contained wetlands areas. After reviewing the application, defendant New Jersey Department of Environmental Protection ("NJDEP") recommended that the waiver be denied and forwarded the application and recommendation to the EPA. On May 5, 1989, after reviewing the application and NJDEP's recommendation, the EPA denied Fernandes' request for a waiver.

Procedural Background

On July 19, 1990, Fernandes filed an Amended Complaint in the United States District Court for the District of New Jersey against Rockaway Township Town Council and the Township Engineer alleging that he was fraudulently induced into purchasing the two lots without Rockaway disclosing a sewer use ban imposed on those properties because of the EPA grant condition. Fernandes v. Rockaway Township Town Council, Civ. No. 90-0830 (MTB). On November 28, 1990, the Hon. Maryanne Trump Barry, U.S.D.J., dismissed the case without prejudice for failure to state a claim for violation of any constitutional right.

On December 4, 1990, Fernandes filed another action against the same defendants in the Superior Court of New Jersey, Law Division, Morris County. Fernandes v. Rockaway Township Town Council, Docket No. MRS-L-5845-90. On July 10, 1991, the court dismissed all but two counts of the complaint; the remaining two were dismissed on January 3, 1992. On January 22,

1993, the Appellate Division affirmed the dismissal of Fernandes' state court complaint, and on March 15, 1993, the New Jersey Supreme Court denied Fernandes' petition for certification. Fernandes' motion for reconsideration from the state supreme court was denied on May 11, 1993, and on October 4, 1993, the United States Supreme Court denied plaintiff's petition for a writ of certiorari.

Undaunted, Fernandes brought another suit in federal court on January 24, 1994, which was assigned to the undersigned. Fernandes v. Rockaway Township et al., Civ. No. 94-338 (WHW). He asserted claims against the EPA, the Regional Administrator, Rockaway Township Town Council and Township Engineer, RVRSA, RVRSA's Executive Director, the law firm of Dorsey & Bell, and John Dorsey and Joseph Bell, individually. The 1994 complaint, as amended, alleged a conspiracy and other wrongdoing by all defendants relating to the 1984 EPA grant condition imposed pursuant to the Clean Water Act, 33 U.S.C. §§ 1251 et seq. **The complaint set forth thirty-nine claims in all, including federal civil rights claims, contract claims, takings claims, and challenges to agency action under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 et seq.**

The federal defendants moved for dismissal of the Complaint on the basis of the doctrine of sovereign immunity, **failure to state a claim upon which relief could be granted**, lack

of subject matter jurisdiction, and failure to comply with the statute of limitations. The Rockaway defendants, including Dorsey & Bell, John Dorsey, and Joseph Bell, moved for dismissal on res judicata grounds, citing the state court suit which concluded in their favor.

The Court heard oral argument on March 27, 1995 and ruled that Fernandes' claims against Rockaway Township, the Town Council and Township Engineer were barred by res judicata by virtue of the previous state court action against those parties. The Court further ruled that the claims against Dorsey & Bell and John Dorsey and Joseph Bell were also precluded by res judicata, "identical issues hav[ing] been decided on prior adjudication."

With regard to the federal defendants, the Court noted that sovereign immunity barred the claims. The Court refused to find a waiver under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346 (b), 2671-2680 because Fernandes had not complied with the administrative claim requirement. **It also found the challenge to the EPA grant condition time-barred by a six year statute of limitations imposed by the APA.**

On May 11, 1995, this Court dismissed all of plaintiff's claims against Rockaway, Rockaway's Township Engineer, the law firm of Dorsey & Bell, John Dorsey and Joseph Bell, individually, RVRSA, and RVRSA's Executive Director, **dismissed without prejudice all of plaintiff's claims against the**

EPA and the Regional Administrator of Region II and denied plaintiff's motion for partial summary judgment. On June 20, 1995, the court denied Fernandes's motion for reargument. **By Letter Order dated August 24, 1995, the Court granted summary judgment in favor of the United States, finding that the EPA had not acted arbitrarily and capriciously when it denied Fernandes's waiver request.**

Fernandes appealed the Court's rulings to the United States Court of Appeals for the Third Circuit. The Third Circuit affirmed the three orders by Judgment Order dated March 26, 1996. The United States Supreme Court denied certiorari on October 7, 1996.

Not to be discouraged by this turn of events, on February 24, 1997, Fernandes filed the instant Complaint against Rockaway, the EPA, the Regional Administrator, the Attorney General of the United States, the EPA Administrator and the Commissioner of the NJDEP. In his Amended Complaint, Fernandes sets out twelve claims for relief arising from the denial of the waiver, including denial of due process and equal treatment; conspiracy by the EPA and NJDEP in violation of 42 U.S.C. §§ 1983 and 1985; violations of his civil rights pursuant to 42 U.S.C. § 1983; a claim entitled "Third Circuit and Supreme Court Limited EPA's Use of Grant Conditions;" violation of EPA regulations and Title VI; failure to comply with the Clean Water Act, 33 U.S.C. §§ 1251 et seq.; denial of federal benefits; illegally charging an assessment; failure of the Attorney General to perform her duty, and intentional

infliction of emotional distress. Fernandes seeks mandamus, declaration of the parties' rights, and millions of dollars in damages.

Analysis

I. Whether Claims Against the Federal Defendants Should Be Dismissed.

The federal defendants move for dismissal of Fernandes' Complaint on the grounds of res judicata, lack of subject matter jurisdiction, failure to state a claim upon which relief may be granted, and the applicable statutes of limitations. The Court has considered all the arguments raised by Fernandes in opposition to the motion and finds them to be without merit. Therefore, dismissal is warranted.

The doctrine of res judicata refers to the "distinctive effects of a judgment separately characterized as 'claim preclusion' and issue preclusion.'" 5 Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 4402, at 6 (1981). Issue preclusion is based upon the notion that "later courts should honor the first actual decision of a matter that

has already been litigated." Burlington Northern R. v. Hyundai Merchant Marine, 63 F.3d 1227, 1231 (3d Cir. 1995). "[0] nce an

issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." Montana V. United States, 440 U.S. 147, 153 (1979). Issue preclusion is applied when "(1) the issue sought to be precluded [is] the same as that involved in the prior action; (2) that issue [was] actually litigated; (3) it [was] determined by a final and valid judgment; and (4) the determination [was] essential to the prior judgment." Burlington Northern, 63 F.3d at 1232 (citations omitted)

Claim preclusion derives from the principle that "prior judgments may preclude later litigation both as to matters that have actually been litigated and decided and as to matters that have never been litigated or decided." 5 Wright, Miller & Cooper, supra § 4406, at 44. Application of the doctrine requires (1) a final judgment on the merits in a prior suit involving; (2) the same parties or their privities; and a (3) subsequent suit based on the same cause of action. Board of Tr. of Trucking Emp. Pension Fund v. Centra, 983 F.2d 495, 504 (3d Cir. 1992) (citations omitted) . When deciding if claim preclusion bars the second action, a court should consider, among other things, whether the acts complained of and the demand for relief are the same (that is, whether the wrong for which redress is sought is the same in both actions), whether the theory of recovery is the same, and whether the material facts alleged are the same. United States V. Athlone Indus.. Inc., 746 F.2d 977, 983 (3d Cir. 1984). A later claim may

be precluded even if different statutes or theories are cited by the claimant. Id.

The 1994 suit before this Court culminated in a final judgment on the merits. Essentially, Fernandes seeks the same relief as he pursued before this Court in the 1994 complaint -- damages and a voiding of the denial of the waiver. The facts have not changed in the meantime, and the parties remain the same. Even though Fernandes has cobbled together different claims and theories as alleged grounds for relief, this Court has already- held that the EPA's denial of the grant waiver was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. - Such a conclusion necessarily includes a finding that the decision to deny the grant waiver was not illegal and did not violate any prevailing law or regulation.

Among the issues raised by Fernandes on his appeal to the Third Circuit was whether "the EPA grant condition represent[ed] a continuing violation by violating the holdings of Cape May Greene [Inc. V. Warren, 698 F.2d 179 (3d Cir. 1983)], other case law and regulations that preceded the grant condition." Reply Aff. of James J. Higgins, Exh. G. In affirming the District Court, the Court of Appeals implicitly concluded that there was no violation. These holdings cannot be relitigated under the guises raised by Fernandes in the present Complaint.

Even if res judicata did not preclude Fernandes' claims, Fernandes' Complaint is deficient for several other reasons. The barrier of sovereign immunity discussed by the Court in its previous opinion has not been surmounted by Fernandes' filing of

an administrative claim under the Federal Tort Claims Act because the applicable statute of limitations of two years has run. See 28 U.S.C. § 2401(b); Zeleznik V. United States, 770 F.2d 20, 22 (3d Cir. 1985). ("[A] suit against the United States under the Federal Tort Claims Act is the exclusive remedy for tort claims arising from the actions of government officials or employees."), cert. denied, 475 U.S. 1108 (1986). Moreover, although Fernandes has invoked the FTCA, he has not named the United States as a defendant, even though the United States is the only proper party in an FTCA suit. See. e.g.. Galvin V. OSHA, 860 F.2d 181, 183 (5th Cir. 1983) . Therefore, Fernandes cannot pursue claims against the EPA, the Administrator, or the Region II Administrator under the FTCA.

Fernandes also styles his Complaint as stating a claim under the citizen suit section of the Clean Water Act, 33 U.S.C. § 1365 (a) (2) , which permits a suit against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under the Act which is not discretionary. However, any claims he may raise under the purview of the citizen suit provisions must fail due to res judicata. The Court has already concluded, in its finding that there was no clear error in the denial of the waiver, that the EPA did not fail to perform any mandatory duty. To the extent that Fernandes challenges the EPA

regulations authorizing the grant condition, his claims are also barred by the statute of limitations governing challenges to agency

action. See 5 U.S.C. §§ 701-706, Bench Opinion of March 27, 1995 ("Bench Op.") at 9-10.

To the extent that Fernandes asserts claims for violations of his civil rights pursuant to 42 U.S.C. §§ 1983, 1985, and 2000d, those claims are barred by the two year statute of limitations applicable to civil rights claims brought in this district. See N.J.S.A. 2A:14-2 (West 1990); Wilson V. Garcia, 471 U.S. 261 (1985) (holding that the statute of limitations for civil rights actions is the same as the state statute of limitation for personal injuries). Fernandes' state law tort claims are similarly barred by the two year limitation for bringing an action under state law.

However, Fernandes' complaints of civil rights violations fail for more substantive reasons. First, Fernandes has failed to allege that these federal actors acted under color of state law -- a requirement for maintaining a § 1983 action based upon denial of due process or equal protection. See U.S. Const. amend. XIV, § 1;' Artway V. Attorney General, 87 F.3d 1235, 1251, 1268 (3d Cir. 1996) . Second, his claims under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d must fail because contrary to Fernandes' position, such a claim requires an alleged discrimination based upon race, color or national origin. Fernandes' argument that equal protection applies when "any person" is denied a benefit simply lacks merit. Therefore, those claims would have to be dismissed for failure to state a claim upon which relief can be granted. Fernandes also claims that Executive Order 12250, 45 Fed. Reg. 72995 (Nov. 2, 1980) requires the Attorney General to find that the regulations appearing at 40

C.F.R. §§ 35.925-8(b) and 35.925.13(e) exceeded the EPA's statutory authority. The Court does not pass on the question of whether Executive Order No. 12250 provides Fernandes with an independent right to sue. Instead, it notes that a government agency's "decision not to prosecute or enforce . . . is a decision generally committed to an agency's absolute discretion." Heckler V. Chaney, 470 U.S. 821, 830 (1985). The presumption against review may be rebutted "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers," (id. at 832-33), a situation not present here.

Moreover, Executive Order 12250, which generally prohibits discrimination in federally funded programs, is modeled upon Title VI. Thus, a claim based upon the Executive Order thus depends upon the viability of Fernandes' claim for relief under 42 U.S.C. § 2000d. As the Court has already stated that Fernandes has failed to state a claim under this statute, Count Eleven must also be dismissed.

Lastly, to the extent that Fernandes seeks damages for an alleged taking, his claims must be dismissed for lack of subject matter jurisdiction for the reasons stated on the record at the hearing of March 27, 1995. See 28 U.S.C. §§ 1346 (a) (2) and 1491(a) (1), Bench Op. at 17-22. For all of these reasons, the Complaint is dismissed with prejudice as to the federal defendants.

II. Whether the Claims Against Rockaway Should Be Dismissed And Whether Rule 11 Sanctions Should Be Imposed.

Fernandes asserts that Rockaway's ordinance "denied a federal benefit," illegally charged an assessment, and intentionally

inflicted emotional distress on him. Fernandes has already brought three separate lawsuits against Rockaway Township on various claims stemming from the same underlying facts -- the denial of the waiver and the limitations placed upon the property sold to him as a result of the EPA grant condition. All three lawsuits were concluded unfavorably to plaintiff, and the most recent dismissal of these claims was with prejudice. Fernandes appealed two of the three dispositions all the way to the United States Supreme Court; at all points, the matters were resolved against Fernandes.

It is clear that these claims against Rockaway Township are barred by res judicata. To the extent that they are not, they are also barred by New Jersey's entire controversy doctrine, which

> **1. 'It appears that Fernandes has a potential remedy. The federal defendants renew their position that Fernandes should submit a completed application for a waiver. They state that EPA's willingness to consider a completed application [with further information relating to the impact of the proposed activities] has not changed." Federal Defendants' Reply Brief at 6. The Court suggests that this route, while not a guarantee of success, is preferable to the continued litigation which has so far proven fruitless for plaintiff.**

requires joinder of "all parties with a material interest, one that can affect or be affected by the judicial outcome of a legal controversy." Cogdell V. Hospital Ctr. at Orange, 116 N.J. 7, 23

(1989). The doctrine is predicated on the notion that the adjudication of a legal controversy should occur in one litigation in

only one court. Esoldi V. Esoldi, 930 F. Supp. 1015, 1025 (D.N.J. 1996); DiTrolio V. Antiles, 142 N.J. 253, 267 (1995). It prevents a plaintiff from litigating claims that were or could have been litigated in a prior proceeding and also bars claims against parties who should and could have been named in the prior proceedings. Itskoff V. F & G Realty of New Jersey, 890 F. Supp. 351, 355 (D.N.J. 1995); Cogdell, 116 N.J. at 26.[2] Therefore, Counts Nine, Ten and Twelve are dismissed with prejudice.

Rockaway Township has moved for sanctions against Fernandes. Rule 11 of the Federal Rules of Civil Procedure states that an unrepresented party may be sanctioned for violations of subsection (b), which provides that a pleading or motion must not be [1]presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;" and requires that the "claims, defenses, and other legal contentions therein are warranted by existing law or by a

[2]A federal court hearing a federal cause of action is bound by New Jersey's entire controversy doctrine, an aspect of the substantive law of New Jersey, by virtue of the Full Faith and Credit Act, 28 U.S.C. § 1738 (1994). Rycoline Prods.. Inc. V. Sun Graphic Inc., 109 F.3d 883, 888 (3d Cir. 1997). Accordingly, the entire controversy doctrine applies to bar claims in a federal court when there was a previous state-court action involving the same transaction. Bennun V. Rutgers the State Univ., 941 F.2d 154, 163 (3d Cir. 1991), cert. denied, 502 U.S. 1066 (1992)

nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law[.]" Fed. R. Civ. P.

11(b) & (c)

Having brought four separate and unsuccessful suits against various Rockaway defendants, it is clear that Fernandes has had more than the proverbial two bites of the apple.[3] **This Court ruled in 1995 that the claims against Rockaway were barred by res judicata. No matter how plaintiff restates or restyles his bases for relief, the issues and the claims are based upon the same facts and have been resolved against him.** To the extent that they have not, the claims are barred by the entire controversy doctrine. Plaintiff's dogged pursuit of claims against Rockaway, claims which have been dismissed by two different courts and passed on by the United States Supreme Court, can only be considered harassment this time. Accordingly, Rule 11 sanctions are appropriate.

Rule 11 instructs that a sanction "shall be limited to what is sufficient to deter repetition of such conduct." Fed. R. Civ. P. 11(c) (2) . Such sanctions may consist of "directives of a nonmonetary nature, . . . or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." Id.

[3] In fact, one may argue that he has sampled the whole orchard.

Rockaway should be compensated for the costs it has

expended in defending this baseless action. According to the Affidavit of Legal Services and Disbursements submitted by counsel for Rockaway, such costs total $3,168.51. However, because the Court is not persuaded that an award of costs is an adequate deterrent in this case, the Court will enter an order enjoining Fernandes from bringing any more complaints against Rockaway Township, its attorneys, the Rockaway Township Town Council, RVRSA, or any of their agents which arise from the denial of the Fernandes' grant waiver application in 1989 or the earlier sale of the property to Fernandes. It is the Court's view that only this type of sanction can deter future attempts at relitigation of this matter.

III. Whether A Default Judgment Should Be Entered Against Defendant NJDEP.

Fernandes notes that defendant NJDEP has not responded to his Complaint and moves for a default judgment against it. The Court is tempted to grant the relief sought by Fernandes against this party. However, a review of the Complaint reveals that the claims against NJDEP rely upon findings that the denial of the grant waiver or the grant condition were illegal or improper, or that NJDEP was a party to a violation of Fernandes' civil rights. These claims all fail for reasons discussed more fully above. Therefore,

the Complaint must also be dismissed as to the NJDEP.

Moreover, claims against the NJDEP should have been

brought in either of the last two lawsuits concerning this subject matter. Because they were not, the entire controversy doctrine prevents Fernandes from being able to assert claims against this defendant now.

Conclusion

Having considered the arguments of counsel and litigant, and for the reasons stated above;

IT IS on this 12 th. day of August, 1997;

ORDERED that the Amended Complaint of plaintiff Nelson Fernandes and all the claims within be and hereby are dismissed with prejudice; and it is

FURTHER ORDERED that plaintiff's motion for summary judgment be and hereby is dismissed as moot; and it is

FURTHER ORDERED that judgment be entered against Fernandes and in favor of defendant Rockaway Township Town Council in the amount of. $3,168.51; and it is

FURTHER ORDERED that plaintiff be and hereby is enjoined from instituting any further suits against Rockaway Township, its attorneys, the Rockaway Township Town Council, RVRSA, or any of their agents, which arise from the denial of the grant waiver in 1989 or the sale of the subject property to Fernandes.

SO ORDERED:

"s/ William H. Walls, U.S.D.J."

EXH. – E May 13, 1996 Denial of Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 95-5433 & 95-5646

NELSON FERNANDES,
Appellant
v.
ROCKAWAY TOWNSHIP, TOWN COUNCIL, AND
TOWNSHIP ENGINEER; R.V.R.S.A (ROCKAWAY VALLEY
REGIONAL SEWERAGE AUTHORITY);
E.P.A. (ENVIRONMENTAL PROTECTION AGENCY);
DORSEY & BELL; JOHN H. DORSEY; JOSEPH BELL

(D.C. Civ. No. 94-cv-00338)

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge,
BECKER, STAPLETON, MANSMANN, GREENBERG,
SCIRICA, COWEN, NYGAARD, ALITO, ROTH,
LEWIS, McKEE and SAROKIN, Circuit Judges.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

Circuit Judge

Dated: May 13, 1996

EXH. – F Appellate Affirmation of the District Court Orders

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 95-5433 & 95-5646

NELSON FERNANDES,
Appellant
v.
ROCKAWAY TOWNSHIP, TOWN COUNCIL, AND TOWNSHIP ENGINEER; R.V.R.S.A (ROCKAWAY VALLEY REGIONAL SEWERAGE AUTHORITY); E.P.A. (ENVIRONMENTAL PROTECTION AGENCY); DORSEY & BELL; JOHN H. DORSEY; JOSEPH BELL

Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action No. 94-cv-00338
(Honorable William H. Walls)

Submitted Pursuant to Third Circuit LAR 34.1(a)
March 15, 1996

Before: STAPLETON, SCIRICA and COWEN, Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the district court's order entered May 15, 1995, letter-order entered June 20, 1995, and letter-order entered August 28, 1995, **be and are hereby AFFIRMED.**

Costs taxed against appellant.

BY THE COURT,
Circuit Judge

Attest:
DP. Douglas Sisk, Clerk, March 26, 1996

EXH. – G Aug. 24, 1995 Order

Re: Nelson Fernandes v. Rockaway Town Council and Township Engineer, et al. Civil Action No. 94-338 (WHW)

Dear Counsel:

This matter is before the Court on Defendant Environmental Protection Agency's motion for clarification.

INTRODUCTION

On August 6, 1985, Rockaway Township held a public sale of real property by auction. Rockaway Township sold all property "as is" without any representations "as to the condition, area, or boundaries." Lot 8 was one of the land parcels on which the public bid. A portion of lot 8 was covered by environmentally sensitive freshwater wetlands.

On September 21, 1985, Plaintiff Fernandes won ownership of lot 8 by bidding $10,000.00. Fernandes had a title search done at the time of purchase. On November 15, 1985, Fernandes took title to lot 8 by deed recorded with the Morris County Clerk. Planning to build a single family dwelling, Fernandes hoped to connect the home to an adjacent municipal sanitary sewer line. However, his application for the connection was rejected because of a grant condition imposed by the federal government.

In 1983, the federal government gave Rockaway Township a grant so that the Township could build a sanitary sewer system. According to Grant Agreernent No. C340389-04-02, lots within an environmentally sensitive area ("ESA") cannot be connected to federally funded sewers. The purpose of the condition is to protect the surrounding wetlands. Fernandes' request for a waiver from EPA's ban to connect to the sewerage system was denied.

In January 1994, Fernandes filed a Complaint naming the following defendants: the Environmental Protection Agency ("EPA"), the EPA" Regional Administrator ("Regional Administrator"), Rockaway Township, Rockaway Town Council, Rockaway Township Engineer, Rockaway Valley Regional Sewerage Authority ("RVRSA"), Dorsey & Bell Law Off ice, John Dorsey and Joseph Bell. All of the above-named defendants moved to dismiss plaintiff's Complaint. Fernandes cross-moved for a partial summary judgment. EPA and the EPA Regional

Administrator then moved for a partial summary judgment.

In its May 11, 1995 Order, this Court (1).dismissed with prejudice all of plaintiff's claims against defendants Rockaway Township Town Council and Township Engineer, Dorsey and Bell, John Dorsey and Joseph Bell, and Rockaway Valley Regional Sewerage Authority and its Executive Director, **(2) dismissed without prejudice all of plaintiff's claims against United States Environmental Protection Agency and Regional Administrator of Region II and** (3) denied plaintiff's motion for partial summary judgment. EPA's motion for partial summary judgement was not decided. EPA presently moves for clarification as to the status of its motion for partial summary judgment. The motion for clarification is granted and this Court will now proceed with its determination of the partial summary judgment motion.

DISCUSSION

The EPA requests a finding that its denial of Fernandes l grant waiver was not arbitrary and capricious. A reviewing court must set aside agency action deemed " to be arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law." **5 U.S.C. sec. 706(2) (A).** The court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Stoeco Dev. . Ltd. V. Department of Army Corps of Eng'rs, 701 F.Supp 1075, 1080 (D.N.J. 1988), appeal dismissed, 879 F.2d 860 (1989) (quoting Citizens to Preserve Overton Park V. Volpe, 401 U.S. 402, 415-16 (1971)). However, the court is "not empowered to substitute its judgment for that of the agency." Td. The standard of. review is "highly deferential"; agency findings are "entitled to a presumption of regularity." Id.

Before granting a waiver application, the EPA must be assured that the proposed activities do not violate the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387. Congress enacted the CWA in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. sec. 1251 (a). Thereafter, the discharge of dredged or fill materials from a point source into wetlands without a section 404 permit issued by the U.S. Army Corps of Engineers became prohibited. See 33 U.S.C. §§ 1311 (a), 1344.

Before granting a waiver application, the following factors are to be considered: (1) area extent of vacant parcel(s) which

contain ESAs (i.e., floodplains and/or wetlands); (2) extent and ecological quality of ESAs affected; and (3) amount of existing development surrounding the parcel(s). See Exhibits to Declaration of Robert W. Hargrove, Exh. D. To obtain the necessary information, an inspection of the property was conducted in March 1989 at the request of the EPA. Id. at Exhs. N, 0. The inspection revealed extensive wetlands, several small streams running from the property into White Meadow Lake, and significant development of surrounding lots. Id. Based on the above data, the EPA denied Fernandes' waiver application. The EPA has offered to

reevaluate Fernandes' application provided that a more recent site inspection is performed and information demonstrating that any sewer system connections will not jeopardize the wetlands is provided.. Id. at Exhs. Q, R.

Based on the above, this court finds that the EPA considered the relevant factors and made no "clear error" when reaching its decision. The site inspection conducted in 1989 did not reveal a significant decrease in wetlands warranting reclassification. The property continues to be predominantly wetlands and therefore continues to be protected under the Clean Water Act. The EPA's decision to protect the wetlands is rationally based on the available information. No contravening evidence is offered by the plaintiff.

Accordingly,

IT IS on this 24 th. day of August 1995 ;

ORDERED that the EPA's motion for clarification is granted; and it is further

ORDERED that EPA's motion for partial summary judgment is granted.

WILLIAM H. WALLS, U.S.D.J.

EXH. – H June 19, 1995 Denial of Reargument

Dear Counsel:

This matter is before the Court on plaintiff's motion for reargurnent.

INTRODUCTION

On August 6, 1985, Rockaway Township held a public sale of real property by auction. The terms of the public auction were that the property was sold "as is" and that "no representations of any kind are made by the Township of Rockaway as tQ the condition, area, or boundaries of the property herein relevant. " Lot 8 was one of the land parcels on which the public bid. A portion of lot 8 was covered by environmentally-sensitive freshwater wetlands. On September 21, 1985; plaintiff won ownership of lot 8 by bidding $10,000.00. plaintiff had a title search done at the time of purchase. On November 15, 1985, plaintiff took title to lot 8 by deed recorded with the Morris County Clerk. Plaintiff later purchased lot 9 which is adjacent to lot 8. He planned to subdivide the two lots and build a single family dwelling. plaintiff hoped to connect the single family home to the municipal sanitary sewer line that ran adjacent to his lots. However, his application was rejected because of a grant condition imposed by the federal government. In 1983, the federal government gave Rockaway Township a grant so that the Township could build a sanitary sewer system. According to Grant Agreement No. C340389-04-O2, lots within an environmentally sensitive area could not be connected to federally funded sewers. The purpose of the condition is to protect the surrounding wetlands. plaintiff's lots are two of approximately 140 lost in the Township which were impacted by the EPA grant condition. plaintiff attempted to obtain a waiver from EPA's ban, but defendant Rockaway Valley Regional sewage Authority received a letter on May 5. 1989 from the EPA's Acting Regional Administrator denying the request.

All of the defendants moved to dismiss plaintiff's various claims against them. plaintiff cross-motioned for partial summary judgment. EPA, in addition to its motion to dismiss, moved for partial summary judgment against the plaintiff.

In its May 11, 1995 Order, this Court (1) dismissed with

prejudice all of plaintiff's claims against defendants Rockaway Township Town Council and Township Engineer, Dorsey and Bell, John Dorsey and Joseph Bell, and Rockaway Valley Regional Sewerage Authority and its Executive Director, (2) **dismissed without prejudice all of plaintiff's claims against United States Environmental Protection Agency and Regional Administrator of Region II** and (3) denied plaintiff's motion for partial summary judgement. EPA's motion for partial summary judgement was not decided.

Discussion

Under Rule 12(I) of the United States District Court Rules, the party moving for reargument must state "concisely the matters or controlling decisions which [said party believes the Judge or Magistrate has overlooked." Id. If the motion is granted, "the matter shall be reargued orally." Id.

The primary determination in a motion for reargument is whether "dispositive factual matters or controlling decisions of law" were overlooked by the Court. Pelham v. United States, 661 F.Supp. 1063, 1065 (D.N.J. 1987). A motion for a reargument is not an opportunity for a party to presen't new arguments. Florham Park Chevron, Inc. v. Chevron U.S.A., Inc., 680 F. Supp. 159, 162 (D.N.J. 1988). Where the Court has not overlooked facts and cases properly presented at the time of the motion, the Third Circuit has consistently denied relief. See Egloff v. New Jersey Air National Guard, 684 F. .Supp. 1275 (D.N.J. 1988). A party's disagreement with the Court's decision "should be dealt with In the normal appellate process, not on a motion for reargument." Florham Park Chevron, 680 F. Supp. at 163.

Simply stated, plaintiff sets forth no matter or controlling decision which was overlooked by this Court. Therefore, plaintiff's motion for reconsideration is denied.

CONCLUSION

For the reasons set forth in this Letter Opinion, it is on this 19 th. day of June 1995

ORDERED that Plaintiff's motion for reargument be and hereby is denied.

"s/ William H. Walls, U.S.D.J./

EXH. – I May 11, 1995 Order

BOYAR, HIGGINS & SUOZZO, P.A. (JH 8207)
A Professional Corporation
10 Park Place, Suitte. 415
Morristown, New Jersey 07960
(201) 538-8008
Attorneys for Defendants, Rockaway Township
Town Council and Township Engineer

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NELSON FERNANDES, Civil Action # 94-338(WHW)
Plaintiff,
ROCKAWAY TOWNSHIP TOWN
COUNCIL AND TOWNSHIP
ENGINEER, et al
Defendants .
x

ORDER DISMISSING AMENDED COMPLAINT AS TO ALL DEFENDANTS

THIS MATTER having been opened to the Court on March 27, 1995, honorable William H. Walls, U.S.D.J. presiding, upon defendants' motions brought pursuant to Fed.R.Civ.P.12(b)(l), Fed..R.Civ.P.12(b)(6) and Fed.R.Civ.P.56 to dismiss the Amended Complaint, by defendants, Rockaway Township Town Council and Township Enginee:r by Boyar, Higgins & Suozzo, P.A. (James J.Higgins, Esq. appearing); by defendants, United States Environmental Protection Aqency and Regional Administrator of Region II, by the United States Department of Justice (Mark A. Rigau, Esq. appearing); by defendants, Dorsey & Bell, John Dorsey and Joseph Bell by Dorsey & Fisher (Douglas R. Cabana, Esq. appearing); and by defendants, Rockaway Valley Regional Sewerage Authority and Executive Director, by McManimon & Scotland (Joseph Maraziti, Esq. appearing); and on cross-motion of plaintiff, Nelson Fernandes for partial summary judgment (Nelson Fernandes, pro se appearing), and the Court having considered the papers filed by the moving parties and those submitted in opposition, having heard oral argument on March 27, 1995 and for

good cause shown, all as set forth on the record, 1995:

IT IS on this 11 th. day of May, 1995:

ORDERED, that the motion of all defendants be and the same are hereby granted; and it further

ORDERED, that the Amended Complaint be and the same is hereby dismissed with prejudice as to defendants, Rockaway Township Town Council and Township Engineer; Dorsey & Bell, John Dorsey and Joseph Bell; and Rockaway Valley Regional Sewerage Authority and its Executive Director, with no costs; and it is further

***ORDERED,* that the Amended Complaint be and the same is hereby dismissed without prejudice, as to defendant, United States Environmental Protection Agency and Regional Administrator of Region II**; and it is further

ORDERED, that plaintiff's motion for partial summary judgment be and the same is hereby denied; and it is further

ORDERED, that counsel for defendants, Rockaway Township Town Council and Township Engineer, shall serve a copy of this Order upon plaintiff pro se and all counsel appearing within 10 days of it having been entered.

"s/WILLIAM H. WALLS, U.S.D.J."

EXH. - J Mar. 27, 1995 District Court Opinion
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Civil No. 94-0338(WHW)

TRANSCRIPT OF PROCEEDINGS - March 27, 1995

FERNANDES, Plaintiff,

-vs-

ROCKAWAY TOWNSHIP, ET AL, Defendants.

B E F 0 R E:
THE HONORABLE WILLIAM H. WALLS,
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

NELSON FERNANDEZ, PRO SE.
BOYAR, HIGGINS & SUOZZO, P.A.
BY: JAMES J. HIGGINS, ESQ.,
-and-
MC MANIMON & SCOTLAND, ESQS.,
BY: JOSEPH J. MARAZITI, JR., ESQ.,
-and-
DOUGLAS R. CABANA, ESQ.,
Attorneys for Defendants.

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above-entitled proceedings.

PHYLLIS T. LEWIS, C.S.R.
OFFICIAL COURT REPORTER - U.S. DISTRICT COURT
P.O. BOX 25588, Newark, New Jersey, 07101
(201) -645-3677

Start of Page 2

(March 27, 1995)
(The foregoing was not ordered at this time.)

THE COURT: In August of 1985 Rockaway Township held a public sale of real property. That was done by auction. Property was sold "as is." No representations of any kind were made by the Township of Rockaway as to the condition, area or boundaries of the property sold.

Lot 8 was one of the land parcels which was available for bidding by the public. A portion of that lot was covered by the environmental sensitive fresh water wetlands.

The present plaintiff, Mr. Fernandez, won by bidding $10,000 for Lot 8, and he had a title search done at time of purchase and took title by deed recorded with the Morris County Clerk.

He later purchased Lot 9 adjacent to Lot 8, and according to his representations, planned to divide the two lots and build a single-family dwelling. He hoped to connect it to the sanitary sewer line that ran adjacent to his lots. However, his application was rejected because of a grant condition imposed by the federal government.

In 1983 the federal government had given or gave Rockaway Township a grant in order that the Township could build a sanitary sewer system.

Acording to that grant agreement, lots within that

Start of Page 3

environmental sensitive area could not be connected to federally funded sewers. The purpose of the condition was to protect the surrounding wetlands.

Unfortunately, plaintiff's lots are two of approximately 140 lots in the Township which were impacted by that grant condition.

Mr. Fernandez attempted to obtain a waiver from that ban of the EPA, but in 1989 Rockaway Valley Regional Sewerage Authority received a letter from the EPA's Acting Regional Administrator denying the request.

Consequently, Mr. Fernandez sought the aid of Federal Court, U.S. District Court for this district, and brought a

complaint against Rockaway Township Town Council and the Township Engineer, and that complaint or a later amended complaint alleged ten causes of action, including alleged material misrepresentation, violation of statute and fraudulent concealment

That was dismissed by Judge Barry of this Court on November 28, 1990 determining that it might be better for plaintiff to commence his action before the State Court, which he did.

Apparently in 1991, and again in 1992, his State Court actions were dismissed by the Superior Court of New Jersey.

Start of Page 4

He had in the amended complaint before the State Court alleged:

(1) That the sale of property to him by Rockaway Township was in violation of state statute 40:A12-13.

(2) That there was a malicious policy and custom of Rockaway Township Town Council to sell worthless lots in violation of 42 USC section 1983.

(3) That the Township Engineer had conspired with the Town Council in carrying out this policy with regard to the sale of lots.

(4) That the Township Council members conspired among themselves to effect the sale of lots which represented a malicious abuse of governmental power.

(5) That there was, in addition, conspiracy to have the Township conceal the EPA grant condition.

(6) That the Township arbitrarily denied requests from owners of wetland lots to conceal the original conspiracy.

(7) That the Rockaway Township Engineer harrassed plaintiff in violation of his constitutional rights.

(8) That such rights were infringed by the Township Engineer, which represented discrimination upon plaintiff who was a member of a minority.

(9) That there was fraud committed upon him and the public when the Rockaway Township made an "as is" sale, making it appear to conform to statutes.

Start of Page 5

And lastly, that the Township sale of the lots contrary to the statute represents a taking and implied promise to pay compensation.

As I said before, this complaint was dismissed in two parts really by two Superior Court Judges, and thereafter exercising the right of automatic appeal to the Appellate Division. Again, Mr. Fernandez lost. The Appellate Division asserting in dismissing the matter, "We see no basis for breach of contract claims advanced by plaintiff to the extent he relies upon tort claims because of the personal injury aspect of the federal claims." He was barred by the statute of limitations, and also, that the claims pursuant to 42 USC section 1983 were barred by the New Jersey's two-year statute of limitations.

Thereupon, Mr. Fernandez sought relief from the New Jersey Supreme Court, which denied certification in March of 1993. He petitioned the Court for reconsideration which again was denied in May in 1993.

Thereafter he sought writ of certiorari from our United States Supreme Court, which was denied in October of 1993.

I think I fairly represented the procedural history, and now he commences this present action before this Court, having done so in January of last year, January 24, 1994.
Start of Page 6

As I said originally to him, I repeat to all parties, with regard to the claims brought against Rockaway Township, the Town Council and Township Engineer, all of those, in my opinion, have been the subject of res judicata. His claims against Rockaway Township, the Town Council and the Township Engineer have been adequately and fully, in my opinion, presented and tested before trial judges and through the process of appellate review.

These matters, as I said, were denied. The merits of them were found to be wanting by two Superior Court judges and later by the Appellate Division, which action was reviewed by our highest tribunal. Because these claims have already been adjudicated, they are therefore barred. All of the elements of res judicta are satisfied, and his claims against these parties are dismissed.

Plaintiff's claims brought against defendants Dorsey & Bell Law Office, John Dorsey and Joseph Bell, are dismissed by the doctrine of collateral estoppel. The thrust of that type of determination is that identical issues have been decided on prior adjudication. There has been a final judgment on the merits

The party against whom the bar has been asserted either was a party or in privity with a party of the former adjudication, and the party against whom the bar is associated had a full and fair opportunity to litigate the

Start of Page 7
issues in question.

Defendants John Dorsey and Joseph Bell of the Dorsey & Bell law firm represented Rockaway Township in the first action. Plaintiff alleged in discovery, that said defendants were aware of the Rockaway Township's policy to sell wetland lots.

Furthermore, plaintiff contends defendant Joseph Bell admitted alleged concealment before the Superior Court. The issue of whether Rockaway Township concealed the grant petition has already been adjudicated.

The claim asserting knowledge of Rockaway Township's concealment made against the attorneys in the law office must per force fail if a court already determined that Rockaway Township did not conceal the grant condition, or that the burden of proof with regard to this assertion has not been met.

Therefore, these matters having already been adjudicated adversely against him, they have to be dismissed, as I do now dismiss them, against the individual attorneys.

Now, Mr. Fernandez comes with an attack upon the actions of the EPA and Regional Administrator. Basically he seeks $20 million against the EPA and the Regional Administrator. I will be very succinct about it. The Government only permits itself to be sued under sovereign

Start of Page 8
immunity, and here there has been no waiver of sovereign immunity. Therefore, any seeking of $20 million must be dismissed because such claims are barred by the doctrine of sovereign immunity. The United States is immune from suit except if it consents to be sued.

In relation to his claim against the Regional Administrator of Region II, he does not name a particular person. No individual is on notice of a lawsuit against him personally, and no one is aware of an obligation to defend. Should we treat this then as an official capacity claim, official capacity suits are pleaded as actions against the entity because the entity is the real party in interest. Under those circumstances, the plaintiff can only recover damages from such an entity, unlike a circumstance of where an individual has been named in the complaint specifically.

Here the plaintiff does not even name an individual. It appears that he is simply using this in an attempt to recover more money from the Government.

However, as I said before, the Government only can consent to be sued, and in this capacity claim for better status, we note that the Government has not waived immunity.

Plaintiff argues that immunity is waived under the Federal Tort Claims Act 28 USC sections 1346(b), 2671-2680. However, he has not complied with the Federal Tort Claims administrative claim requirement which is a jurisdictional

Start of Page 9

prerequisite to maintaining a suit. See Livera vs. First National State Bank of New Jersey, 879 F.2d 1186, 1194, a Third Circuit decision in 1989, which has been reviewed by our own United States Supreme Court in denying cert, 493 U.S. 937.

Mr. Fernandez also argues that immunity is waived under the National Environmental Protection Act, but again, the government must waive sovereign immunity, particularly where he seeks damages because of a violation of that act does not give rise to monetary damages. Fund for Animals, Inc. vs. Espy, 814 F. Supp. 142, 151, a 1993 case from the District of Columbia teaches us so.

Plaintiff brings claims under 42 USC 1981, 1982, 1983 and 2000(d), claiming immunity having been waived under the Federal Tort Claims Act, but as I noted, he has not complied with the jurisdictional prerequisite.

Additionally, plaintiff says that he wants $20 million in damages, and he makes a takings claim. Under the

Tucker Act, soverign immunity is waived and recovery on a takings claim is permissible in Federal District Court if the recovery is limited to $10,000. Otherwise, he must seek the forum of the United States Court of Federal Claims. However, again, there has been no waiver of immunity.

With regard lastly to his challenge to the EPA grant condition, that is subject to a six-year statute of

Start of Page 10

limitations found in 28 USC section 2401(a). That cause of action consists of the plaintiff's rights claimed and the defendant's infringement of that right. The grant of that right accrued when the condition became final, when it was accepted in February of 1984. The statute of limitations began to run then. Plaintiff's complaint was filed on January 27, 1994. His challenge is barred by the statute of limitations and is dismissed.

Plaintiff's claims against the EPA and the Regional Administrator are dismissed so, too, against Rockaway Valley Sewerage Authority, because there is no evidence that would independently link RVRSA, which is Rockaway Valley Regional Sewerage Authority to any claimed acts.

Any claimed acts against that authority are dependent upon any cognizable acts that plaintiff could make against other defendants, which unfortunately he failed to do. For those reasons, the matters are dismissed.

(The matter was concluded.)

EXH. – K Amended Complaint

Nelson A. Fernandes, Pro Se
9FoxRun
Denville, N.J. 07834

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No: 96-5791 **(WHW)**

CIVIL ACTION
AMENDED COMPLAINT

Nelson Fernandes,
Plainflff,
-vs-

EPA , Administrator of the EPA,
Regional Administrator for Region II,
Commissioner of NJDEP,
Rockaway Township Town Council,
Attorney General,
Defendants.

PARTIES

Plaintiff: Nelson Fernandes, 9 Fox Run, Denville, N.J. 07834, (201) 627-2138 (Pro-Se)

Defendants: Administrator of EPA, 401 M.St. S.W., Washington, D.C. 20460,
Reg. Admin. for Region II, Rm. 937A, 26 Federal Plaza, N. Y., N.Y. 10278, Commissioner of N.J.D.E.P., CN402, Trenton, N.J. 08625-0029, Rockaway Township Town Council, 65 Mt. Hope Rd., Rockaway 07866-1698.
Attorney General, USD of Justice, 950 Pennsylvania NW, Wash., DC 20530

JURISDICTION

Federal Tort Claims Act, 28 U.S.C. §§ 1346(a) (b); 2671-2680 (1988) ("FTCA").
42 U.S.C.§ 1983 42 U.S.C.§ 1985(3) 33 U.S.C.§ 1251 et eq.
28 U.S.C. § 1331 28 U.S.C. § 1332 28 U.S.C. § 1366
28 U.S.C. § 1343 42 U.S.C. § 2000d et seq.
5 U.S.C. §701 et seq.
28 U.S.C. § 2201 28 U.S.C. § 1361 28 U.S.C. §1651

Pendent jurisdiction of pendent state claims that arise out of the same nucleus of operative facts. United Mine Workers V. Gibbs, 383 U.S. 715 (1966).

PLAINTIFF DEMANDS A JURY TRIAL

Each fact or allegation is to be considered a pertinent part of any other claim if needed to complete that claim, so that claim is not considered defective by its absence.

Rockaway Township will be referred to as "Rockaway", the Rockaway Valley Regional Sewer Authority will be referred to as "RVRSA", the Environmental Protection Agency will be referred to as "EPA", the N.J. Department of Environmental Protection will be referred to as "NJDEP", the Clean Water Act will be referred to as "CWA".

PERTINENT FACTS AND STANDING.

1. Rockaway Township knew its ordinance denying sewer service was illegal. So it fraudulently concealed the fact that it relied on its ordinance. Rather than disclose this fact, it sold land affected by said ordinance to plaintiff. The township then approved plaintiffs subdivision although it could not be connected to the sewer, nor be granted a permit to build a septic system. After the subdivision was approved, the township denied plaintiff building permits by making it appear that said grant condition occurred after the subdivision was approved.

2. Plaintiff was denied the right to build as the result of said grant condition. However, the only authority that existed to deny connection was the town's ordinance that was conceald to make it

appear that Rockaway was acting in support of federal authority. After being denied the right to build, plaintiff followed the procedures provided by Rockaway to obtain a grant waiver.

3. On October 21, 1988 the NJDEP, Division of Coastal Resources exempted plaintiffs property from having to obtain a freshwater wetlands permit.

4. On April 1, 1989, plaintiff received a letter from the NJDEP, Division of Water Resources stating that it was reconfirming its recommendation to deny plaintiffs waiver, although plaintiff never received the original recommendation to deny his waiver.

5. On May 5, 1989, plaintiff received a copy of EPA's official denial of his grant waiver that relied on NJDEP's recommendation.

6. Plaintiff met with the EPA and NJDEP on May 30, 1989. During that meeting, Mr. Llewellyn, EPA's attorney, admitted plaintiff could fill his lots based on an ACOE permit, thus destroying the wetlands on his lot, but refused to allow plaintiff to connect to the sewer. There was no mention of nonpoint source mnoff.

STANDING

7. Plaintiff was provided sewer connection slips by Rockaway's Engineering Dept. to show that connection points were provided to service his lots.

8. Plaintiff paid a sewer assessment in detrimental reliance of these slips, thus entitling him to sewer service, that was later denied by Rockaway Township, RVRSA, NJDEP, and EPA.

9. Plaintiff had the lots subdivided in detrimental reliance of the sewer connection slips and the assessment that he paid.

10. Rockaway Township, RVRSA, NJDEP, and EPA dealt with plaintiff as a person entitled to sewer service, but denied the right by the grant condition. Processing plaintiffs grant waiver appeal until denied on May 5, 1989, represents an affirmative act amounting to a waiver of their right to challenge plaintiffs right to enforce a Title VI regulation, or challenge the validity of the regulation they rely on.

11. Plaintiff is a third party beneficiary to Grant No. C340389-04.

12. Plaintiff is entitled to service since 40 CFR Ch. I, Subpart. F, §30.600 (E) requires: These authorities prohibit you from excluding any person from paflicipating in, denying them the benefits of. . . any program or activity involving federal financial assistance.

13. Plaintiff filed a notice of intent to sue in accordance with the citizen's suit provision of the Clean Water Act, which provides a waiver of EPA's sovereign immunity.

CLAIM ONE - EPA's, Mr. Hargrove, proposed a Denial of Due Process & Equal Treatment.

1. Robert Hargrove, as a soils conservationist, wrote a memo on 4/23/79 on "Limited access interceptor sewers as they relate to the construction grant program in New Jersey" (Exh. A).

2. His memo went beyond the concept in the article that it was based on, by recommending a grant condition to limit sewer hook-ups that is part of Grant No. C340389-04.

3. He reviewed cases related to sewer service but never considered the Title VI regulation or other federal court rulings that bar the grant condition that he recommended.

4. His "EPA Authority Section" contained no statutory, regulatory, or judicial authority to support EPA using a grant condition, nor did it present the federal law that prohibits its use.

5. Mr. Hargrove knew N.J. septic regulations would not allow permits for septic systems on lots within 100' of a sewer line (Exh. A, p.2). Hence, the grant condition caused plaintiff a denial of state rights and a due process violation, since no procedure is adequate to protect his right.

6. Mr. Hargrove's failure to address a large body of federal law that would be violated, shows he recklessly disregarded plaintiffs rights.

7. Regional Administrator abdicated his duty by failing to have the Attorney General determine if Mr. Hargrove's concept complied with federal and state law, thus failing to perform the nondiscretionary duty of complying with enabling authorities.

8. Plaintiff asks the court to review the allegations in this claim.

CLAIM TWO - Mr. Sullivan Instituted a Policy to Deny Due Process and Equal Treatment.

1. Mr. Sullivan, Chief of EIS Preparation Branch, wrote a policy memo dated 5/25/79 on the subject of "Grant and Permit Conditions to Restrict Sewer Hookups in Environmentally Critical Areas" (Exh. B). His memo required the initial use of the grant condition to deny sewer hookups in grants to be provided to Cape May, New Jersey and two others areas, which precede the grant provided to the RVRSA that affects plaintiff.

2. Mr. Sullivan relied on Mr. Hargrove's memo although on its face it results in a denial of due process and equal treatment (Exh. A, p. 2).

3. Mr. Sullivan also relied on regulation 35.925-8(b) that appears in Attachment 1 to his memo as the authority for imposing grant conditions (Exh. B, p.6).

4. This regulation exceeds EPA's statutory authority by disregarding federal law that prevents conditions relating to plaintiffs rights, unless there is explicit statutory authority.

5. Mr. Sullivan also relied on regulation 35.925-13(e) as providing authority to impose a grant condition to restrict sewer hook-ups (Exh. B, p.7). This regulation exceeds EPA's statutory authority, thus denying due process and equal treatment, when that condition was used.

6. Plaintiff asks the court to declare whether the preceding regulations fail to stay within the authority of the enabling statute.

PAGE 2

7. Mr. Sullivan knew these regulations were inadequate by recognizing conditions of this type were only accepted when instituted by the state (Exh. B, p. 2). However, no such law existed in New Jersey.

8. Mr. Sullivan then instituted a scheme to deny due process in his memo, under "Strategy and Timetable" (Exh.B, p.5) "6. Negotiate with State to require them to amend its review procedure to reject grant applications and deny sewer extension permits.

9. EPA had NJDEP deny waiver requests, so EPA could deny plaintiffs waiver on the grounds that it was supporting state action, in order to fraudulently conceal their own violations.

10. This conspiracy represents an affirmative act amounting to a waiver of EPA's and NJDEP's right to rely on statute of limitations or other defense that would bar judicial review.

11. Mr. Sullivan's policy constitutes a "conscious and express" abdication of EPA's enforcement duties under the Clean Water Act (CWA).

12. EPA failed to perform a nondiscretionary duty by creating a wetland lots classification in a grant condition instead of the manner provided by 33 U.S.C. § 1316.

13. EPA failed to perform a nondiscretionary duty by invading this state's independence when it negotiated a denial of due process with NJDEP, to affect its quasi judicial proceedings.

14. On July 11, 1980, Eckardt C. Beck, Assistant Administrator for Water and Waste Management, wrote a memo approving the use of Mr. Sullivan and Mr. Hargrove's concept, making this an official EPA discriminatory policy (Exh. C).

15. Endorsing a policy that negotiates a denial of due process and equal treatment with a state agency is a failure to perform the nondiscretionary duty of constitutional conduct.

16. The EPA proceeded with it plan to cause plaintiff intentional infliction of emotional distress as the means that would prevent him from challenging their action.

17. Plaintiff prays the court review the above and declare the rights of the parties on each of the above issues.

CLAIM THREE - EPA and NJDEP's Conspiracy.

1. The underpinnings of this conspiracy are contained in Mr. Sullivan's 5/25/79 memo (Exh. B, p. 5) "6. Negotiate with State to require them to amend its review procedure to reject grant applications and deny sewer extension permits.

2. Presenting this memo in the earlier case represents the first disclosure of this ongoing concealment of EPA's conspiracy with the NJDEP.

3. Mr. Sullivan's policy led EPA to "consciously and expressly" abdicate its enforcement duties under the Clean Water Act (CWA) by conspiring with the NJDEP to have them review and recommend denial of plaintiffs grant waiver appeal in violation of due process. This conspiracy was done in violation of 42 U.S.C. 1983 and 1985.

4. The EPA failed to perform a nondiscretionary duty by

involving the NJDEP in the grant waiver review process.

5. The EPA directed the RVRSA to submit grant waiver appeals to the NJDEP.

6. NJDEP, Division of Water Resources recommendation to deny plaintiffs grant waiver amounted to an affirmative act waiving its right to claim the protection of the statute of limitations and any other affirmative defense that would bar a judicial review.

PAGE 3

7. NJDEP, Division of Water Resources acted in furtherance of this conspiracy by reviewing Title VI grant waiver appeals, doing a field study, preparing its report, and by recommending the EPA deny plaintiffs appeal as Mr. Sullivan had planned (Exh. E).

8. The review done by the Division of Water Resources, Municipal Waste Water Assistance Element was done at the direction of the Commissioner, making him a party to for this ongoing conspiracy.

9. Plaintiff seeks a declaratory judgment as to the rights of the NJDEP, EPA and plaintiff, or in the alternative, to compel the EPA and NJDEP perform its statutory duties. Plaintiff seeks damages for EPA and NJDEP's invidious discrimination that has damaged plaintiff.

10. NJDEP's ongoing participation in this conspiracy abrogates its Eleventh Amendment Immunity in accordance with 42 U.S.C. § 2000d-7(b), for NJDEP's denial of equal treatment by recommending a denial of plaintiffs grant waiver to further the conspiracy.

11. This statute abrogates immunity for violations after October 21, 1986.

12. Plaintiffs complaint against all the defendants is timely by virtue of the doctrines of waiver, estoppel, fraudulent concealment and the continuing violation theory.

13. EPA denied plaintiffs grant waiver in support of NJDEP's recommendation in furtherance of ifs conspiracy to make it appear that it was acting in support of state action, which amounts to a fraudulent concealment and denial of equal protection that resulted from their joint effort (Exh. F).

14. 33 U.S.C. §§§ 1316,1317, & 1319 do not provide the

EPA with authority to deny sewer service via a grant condition or to make the NJDEP a party to such a denial.

15. This conspiracy was designed to mask the existence of a cause of action by creating a facade of joint federal and state action, requiring both the EPA and NJDEP be parties in this lawsuit in order to show that each lacks the requisite authority and to prove the recommendation of the NJDEP, taken with EPA denial of a grant waiver represents the conspiratorial act.

16. Plaintiff asks the court to declare whether EPA and NJDEP conspired to deny his rights.

CLAIM FOUR - NJDEP's Violation of 42 U.S.C. 1983.

1. NJDEP, Division of Coastal Resources granted plaintiff a freshwater wetlands exemption on 10/21/88 (Exh.D). This exemption ended NJDEP's state authority to act further.

2. EPA conspired with NJDEP, Division of Water Resources to have them recommend denying plaintiff sewer service under the color of state law, in order to deny plaintiffs property right to a Title VI benefit, and to deny him equal treatment, thus violating 42 U.S.C. 1983.

3. NJDEP discriminated against plaintiff by recommending a denial of sewer service in furtherance of its conspiracy with the EPA, so EPA could deny the waiver in reliance of their act.

4. Plaintiff asks the court to declare whether NJDEP violated plaintiffs federal rights.

CLAIM FIVE - Equal Protection Violation.

1. Regulations 35.925-8(b) and 35.925-13(e) rely on implied CWA authority.

2. U.S. Supreme Court held that grant conditions require explicit statutory authority several years before the EPA imposed its grant condition of the RVRSA.

3. The EPA used it rightful authority to impose grant conditions to make the United States liable for an act that was carried out in the name of the government, and has injured people who

were intended beneficiaries of a federal program, so that the government must stand behind the injury done to those who were supposed to benefit, not be injured.

4. The EPA failed to perform its duty by attaching their grant condition to the grant provided to the RVRSA.

5. EPA failed to perform its duty in accordance with its authority, which has resulted in a denial of both; due process and equal protection by instituting regulations that exceed the explicit authority of the Clean Water Act, and constitutional limitations.

6. Plaintiff asks the court to declare whether EPA violated equal protection.

CLAIM SIX - Third Circuit and Supreme Court Limited EPA's Use of Grant Conditions.

1. EPA's Cape May grant condition led to a Third Circuit case, which EPA actively participated in. That case held that EPA exceeded CWA authority, and was exercising authority over people who are not directly subject to EPA authority.

2. That holding acts as a conclusive bar to EPA's imposing it grant condition in any grant in the Third Circuit. The decision of which predates EPA's grant condition on the RVRSA.

3. The Regional Administrator's grant condition imposed on the RVRSA on 2/9/84, represents a failure to perform the nondiscretionary duty created by the Third Circuit holding.

4. EPA's grant condition caused RVRSA members to pass ordinances in support of a contract condition that fails to provide explicit statutory authority and also violates the law of this Circuit.

5. EPA was fully aware of these holdings, so its imposition of the same condition on the RVRSA amounted to an intentional constitutional discrimination aimed at causing plaintiff damage and intense emotional distress.

6. Plaintiff asks the court for a declaratory judgment on this claim.

CLAIM SEVEN - The EPA Grant Condition Violates an EPA Regulation and Title VI.

1. EPA failed to perform the nondiscretionary duty in 40 CFR Ch. I, Sub. F, §30.600 (E), by requiring the RVRSA violate this regulation by complying with its grant condition, after it imposed a duty to not violate the regulation.

2. Publishing this regulation in the annual release of the federal register up to 1995, shows this was the prevailing regulation that should have governed EPA's conduct.

3. **EPA's "failure to comply with regulations is a fatal flaw to administrative action"**

4. Plaintiff as a third party beneficiary seeks to enforce this regulation. Plaintiff also seeks compensatory damages for EPA's intentional discrimination and intentional emotional distress.

5. The violation of this regulation represents a violation of the principles in Title VI upon which this regulation and plaintiffs alternative right to enforce this regulation are based.

6. The foregoing regulation provides a constitutionally protected property interest that EPA's grant condition denies, thus representing a denial of equal protection.

7. If plaintiff is foreclosed from enforcing this regulation then the procedural safeguards to protect his interest are insufficient to protect it, thus resulting in a due process violation.

8. Plaintiff asks the Court to declare plaintiffs rights on this claim.

PAGE 5

CLAIM EIGHT - Administrator / Regional Administrator Failed to Comply with the CWA.

1. EPA's violation of a U.S. Supreme Court ruling that bars using a grant condition without explicit statutory authority renders the condition "void ab initio." Hence, EPA is subject to a damages remedy, including extraordinary damages. Those violations are recapped, as follows:

(a) Taking private property without paying compensation contrary to Court of Claims holding, although EPA's conduct forecloses compensation for a taking.

(b) 40 CFR 35.925-13(e) denies intended beneficiaries due process and equal treatment in violation of the V and XIV Amendments.

(c) Regional Administrator failure to verify that Mr. Hargrove's memo was within the limits of CWA authority.

(d) 40 CFR 35.925-8(b) and 35.925-13(e) exceeds the statutory authority in 33 U.S.C. § 1319.

(e) The EPA exceeded Title VI authority by involving the NJDEP in the review of plaintiffs grant waiver appeal.

(f) Classification "wetland lots" without legal authority.

(g) The Administrator ratified an equal treatment and due process violation.
(h) That violation of equal protection represents a waiver of EPA's sovereign immunity.
(i) Imposing the grant condition without explicit statutory authority.
(j) EPA's conspiracy with the NJDEP.
(k) Violating the holdings of Cape May Greene.
(l) Violating 40 CFR Ch. I, Subpart F, §30.600 (E.

2. Not withstanding the foregoing reasons, EPA also failed to perform the nondiscretionary duty in § § § 1316, 1317 and 1319 which requires identification, regulation and enforcement, not a denial of a federal benefit that fails to comply with these statutes, while it violated a regulation.

3. The grant waiver process denies plaintiff due process since its procedural safeguards are insufficient to protect plaintiffs third party right to connect to the sewer. The grant waiver process subjects plaintiff to EPA's discretion as affected by its conspiracy, instead of the explicit statutory requirements in §§§ 1316,1317 and 1319.

4. EPA's grant condition evinces a belief by the Administrator that wetland lots are introducing pollutants into publicly owned treatment works, since EPA's authority to deny the effluent standard is limited to that reason. Hence, EPA Regional Administrator failed to perform his nondiscretionary duty in accordance with § § 1316 and 1317, which calls for the identification of "new sources' that will be subject to regulatory guidelines and enforcement. Instead, he imposed a grant condition that circumvents the nondiscretionary enforcement duties in § 1319.

5. Or, the Administrator believes that wetland lots increases "nonpoint source" runoff pollution. Hence, denying connection to the sewer, prevents construction in order to prevent the runoff, which fails to perform the duty in 33 U.S.C. § 1316 that allows classification and subsequent regulation and enforcement in accordance with sections 1317 and 1319.

6. EPA believes that preventing connection to the sewer prevents runoff pollution by preventing development of vacant wetland lots. This theory fails to address the runoff from-existing homes built on wetland lots that are allowed to connect to the sewer. Hence, the grant condition bears no relation to the objective

sought by treating members of the same class differently, amounting to a denial of equal treatment.

PAGE 6

7. EPA's failure to require home owners on wetland lots to obtain a permit for the runoff that EPA considers damaging to the waters of the United Stated represents a waiver of its right to argue that said runoff is damaging to said waters. EPA's failure to exercise its authority against these owners further proves the denial of sewer service to vacant wetland lot owners was aimed at taking private property under the guise of regulation.

8. 33 U.S.C. § 1365(a)(2) provides a waiver of immunity to file an action against the Administrator and Regional Administrator where there is alleged a failure to perform any act or duty under this chapter which is not discretionary.

9. 33 U.S.C. § 1365(b) on notice, provides that an action can begin with notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Plaintiff moved in accordance with this provision. Furthermore, notice was given in the manner prescribed by regulation.

10. 33 U.S.C. § 1365(e) also provides a waiver of immunity without the need for notice when an action is brought under another statute. Plaintiff having brought this action under 42 U.S.C. § 2000d et seq., as well.

11. Plaintiff also requests the review contemplated by citizen suit provision, APA, and the review contemplated by Title VI, and any other applicable statute.

12. The Court must enforce the effluent standard applicable to residential lot owners since to distinguish between owners of vacant wetland lots versus developed wetland lots represents an arbitrary discrimination that amounts to a constitutional denial of equal treatment, and a deliberate denial of a federal benefit.

13. The statute of limitations is not a bar to this action, since the EPA has waived its right to rely on the statute of limitations, not withstanding the doctrines of estoppel, equitable tolling, fraudulent concealment and continuing violation also apply to all the defendants.

14. Plaintiff seeks damages as provided by 33 U.S.C. § 1365(a)(2) in the phrase "amount in controversy," and in accordance with Title VI for plaintiffs compensatory damages, the intentional discrimination, and plaintiffs emotional distress, as provided by 33 U.S.C. § 1365(e).

CLAIM NINE - Rockaway Township's Ordinance 54-lOOL Denied a Federal Benefit.

1. Rockaway Township is a member of the RVRSA.
2. Rockaway agreed to comply with 40 CFR Ch. I, Subpart F, §30.600 (E, as a member of the RVRSA, in order to get the federal grant.
3. EPA's grant condition is a contract condition since it fails to present explicit federal statutory authority that Rockaway could act upon.
4. Rockaway passed ordinance §54-lOOL in support of the grant condition, which constitutes local action, since no federal authority was provided to support Rockaway's actions.
5. Rockaway's passage of ordinance §54-lOOL to deny wetland lot owners the right to connect to the sewer in support of EPA's grant condition represents a failure to perform the duty called for by 40 CFR Ch. I, Subpart F, §30.600 (E.
6. Rockaway Township violated a federal regulation that preempts its ordinance, thus proving Rockaway violated federal law.
7. By violating the regulation and Title VI, Rockaway Township violates NJSA 40A:48-2, thus exceeding the authority in an enabling statute, which renders its ordinance "void ab initio".

PAGE 7

8. Passing an ordinance that denied plaintiff the right to connect to the sewer represents a breach of both; the duty created by regulation, and the duty to protect the public.

9. Passing an ordinance that continues to affect plaintiffs class to this date in violation of an enabling statute, Title VI regulation, and their duty, represents a continuing violation.
10. Rockaway's intentional discrimination of a policy Congress considers vital, amounts to a waiver of its affirmative defenses in accordance with federal law.

11. Rockaway's passage of this ordinance represents a violation of 42 U.S.C. 1983 since the town denied plaintiff equal treatment and property rights protected by the Constitution.

12. Plaintiff makes Rockaway Township a party in order to have this court declare the rights of the parties with respect to the ordinance passed in support of a contract condition that fails to provide explicit federal authority.

13. Rockaway Township knew this ordinance violated the law, so it took extraordinary steps to conceal that its actions were in support of local law.

CLAIM TEN - Rockaway Township Illegally Charged an Assessment.

1. Rockaway provided plaintiff with sewer connection slips to lead plaintiff to believe that he could connect to the sewer while concealing the ordinance that would prevent connection.

2. Rockaway sold plaintiff a lot it knew was affected by that ordinance.

3. Rockaway charged plaintiff an assessment though his lots did not appear in the ordinances applicable to the area where they are located.

4. State law provides for a refund of assessments when the benefit for which they were paid was not provided.

5. Rockaway's planning board approved plaintiffs minor subdivision to fraudulently conceal its illegal ordinance and assessment.

6. State regulations preclude septic system within 100' feet of a sewer line. The regulation and grant condition prevents development.

7. Upon plaintiffs application for building permits, Rockaway made it appear that the grant condition was recently imposed in order to conceal that said denial was based on ordinance.

8. Rockaway's acts in furtherance of the grant condition and it nonexistent assessment represent affirmative acts amounting to a waiver of its right to claim the protection of the statute of limitations, res judicata, and claim preclusion in accordance with federal law.

9. Plaintiffs N.J. freshwater wetlands exemption and Army Corp of Engineer's fill permit have long expired, thus preventing

plaintiff from developing.

10. Plaintiff is entitled to damages for being denied the right to build at that time.

11. Plaintiff asks the court to declare plaintiffs rights on these issues

CLAIM ELEVEN - The Attorney General failed to perform their duty.

1. The Attorney General of these United States failed to perform his or her duty in accordance with E.O. 12250 by not recognizing that Regulations 40 CFR 35.925-8(b) and 35.925-13(e) are inadequate since they exceed EPA's statutory authority, in whole or in part. The failure of which creates an implied authority that does not exist.

2. The Attorney General failed to catch the fact that regulation 35.925-13(e) violates federal law, thus exceeding EPA's statutory authority.

3. Attorney General's failure, has resulted in EPA claiming implied authority to impose its grant condition, thus making the Attorney General partially responsible for plaintiff and his class being denied their federal entitlement.

4. The Attorney General's sovereign immunity is waived in 33 U.S.C. § 1 365(a)(2) citizen's suit section of the CWA, since the Attorney General's failure to review the regulations in relation to standing federal law has contributed to EPA's violation of the Clean Water Act.

5. The Attorney General's conduct is subject to review under the APA since the Attorney General failure to perform her duty, has contributed to EPA's violation of law.

6. Plaintiff asks the Court to review this claim in accordance with the APA.

CLAIM TWELVE - Intentional Emotional Distress.

1. EPA, NJDEP and Rockaway has caused plaintiff severe intentional emotional distress by acting in violation of federal law in support of a grant condition that has denied plaintiff equal protection of the law, in order to prevent him from developing his

lots.

2. Their deliberate violation amounts to an affirmative act that waives their right to affirmative defenses to prevent a judicial review.

3. Rockaway has contributed to plaintiffs severe emotional distress by passing a local ordinance to deny plaintiff a federal benefit contrary to a regulation that it was obligated to follow. This deliberate violation is outrageous since it constitutes a denial of equal protection. It requires plaintiff to bring an action against the EPA, NJDEP and Rockaway, in order to show that neither EPA or NJDEP has authority that Rockaway can rely on to jusflty its conduct.

4. EPA created a procedure for grant waivers that included Rockaway, RVRSA, NJDEP and finally the EPA. This procedure is illegal since EPA was violating federal law to impose its grant condition in the first place. This procedure was intended to cause intense emotional distress in each applicant for a waiver, as supported by the fact that the EPA negotiated denials of these waivers with the NJDEP. Therefore, this procedure was designed to deny the very waiver for which the procedure was created, proving deliberate intentional emotional distress.

5. The deliberate denial of due process evinced by EPA's conspiracy with NJDEP proves the procedure to vindicate plaintiffs rights was inadequate, to protect plaintiff from this conspiracy, thus denying plaintiff due process. This conspiracy being extreme and outrageous.

6. EPA's conspiracy continues to this date, proving plaintiff continues to be denied the right to connect, even if he were to file another waiver. Plaintiff class being denied all profitable use of their property while this conspiracy continues.

7. The conduct of EPA, NJDEP and Rockaway is of such a deliberate nature that plaintiff has suffered intense emotional distress in the form of anger, rage, frustration, severe headaches, and other symptoms that include, but is not limited to fear for his life for bringing this action, which has only added to plaintiffs emotional distress.

8. Since EPA's conduct is outlined in a memo that was not available to plaintiff or his class, constitutes a fraudulent concealment of a due process and equal protection. This conspiracy tolls the statute of limitations. EPA and NJDEP's conduct on this point is so outrageous that it amounts to an

affirmative waiver of every conceivable affirmative defense that could be raised to block a judicial review of this conduct.

PAGE 9

DEMANDS

DEMAND ONE

Plaintiff asks the Court to review the foregoing claims in accordance with the statutes on declaratory judgment, APA review, the review contemplated by 42 U.S.C. 2000d et seq., and whatever review is called for by the citizens suit section of the Clean Water Act, as well as any other relief that is within the court's power to grant, beside the relief requested in the following demands.

Any alternative request for relief that the court is not able to grant that must be stricken should only affect the offensive relief without its affecting the relief remaining in that demand.

Each portion of a demand is severable from the rest, so if any is deemed offensive, then the offensive portion can be freely stricken by the Court, while the remaining portion survives.

DEMAND TWO

Plaintiff asks the court to exercise its powers of mandamus within the limits of its discretion as it applies to any violation.

Plaintiff asks the court to exercise its powers of mandamus within the limits of its discretion as it applies to the relief requested.

DEMAND THREE

Plaintiff asks the court to declare the rights of the parties with respect to Rockaway Township's ordinance § 54-1 00L, since that ordinance represents local action that denies a federal benefit in violation of a federal regulation that preempts the ordinance.

Plaintiff also seeks a declaration of his rights with respect to the pendent claim of Rockaway charging an assessment for a lot that does not appear in the assessment ordinance, and his right to recover the assessment paid.

Plaintiff further asks the court to declare whether plaintiff is entitled to prejudgment interest on the assessment paid, since the assessment was part of a fraudulent concealment that would make it appear as though plaintiff would be able to connect, in order to have the statute of limitations run out.

DEMAND FOUR

Plaintiff prays the jury grant him an award of one million dollars or whatever amount the jury deems appropriate for Rockaway Township's intentional infliction of severe emotional distress caused by Rockaway's intentional denial of a federal right, its breach of duty to the public, its violation of 42 U.S.C. 1983 and 2000d et seq., and for deliberately concealing material facts from plaintiff over a prolonged period of time to run the statute of limitations.

DEMAND FIVE

Plaintiff prays the Court declare or render its findings with respect to EPA, NJDEP, Rockaway Township, and Attorney General failed to perform their duty, breach their duty, otherwise violate federal law, and the Constitution as it applies to each allegation, claim, and issue.

DEMAND SIX

Plaintiff prays the jury award him compensatory damages from either the EPA, Rockaway, or NJDEP, individually or collectively in accordance with the respective percentage of culpability.

Plaintiff prays for the loss of profit from the sale of two houses that would have taken place in 1986, in the amount of Two Hundred and Sixty Thousand Dollars ($ 260,000.), plus the recovery of out of pocket costs of approximately forty five thousand dollars ($ 45,000). The percentage of liability to be determined by the jury, or court, if this is not a proper jury issue.

Plaintiff prays the jury award him prejudgment interest at the prevailing rate that is paid in this state or by the federal

government, for each of the intervening years that plaintiff has been denied the use of the profit and his costs. This award to be paid by the parties in accordance with the disposition of liability in the preceding paragraphs.

DEMAND SEVEN

Plaintiff prays the jury award him compensatory damages for severe intense emotional distress in an amount the jury deems appropriate. The jury being asked to fix the percentage of liability for the EPA and NJDEP. If the jury is not entitled to set the percentage of liability, then plaintiff asks the court to set it.

DEMAND EIGHT

Since plaintiff is not entitled to bring a class action suit, plaintiff prays for extraordinary damages in the amount of twenty five million $25,000,000. dollars or whatever amount a jury deems appropriate. These moneys are to be put into an interest bearing trust fund that will be used to compensate individual lot owners for damages beyond the compensation for a taking as it applies to a grant condition that prevents sewer connection in any grant provided by the EPA. Compensation; for intense emotional distress will be limited to $ 5,000. and compensatory damages will also be limited to $5,000. as well. Every claim will be supported by a court order that reviewed the damages before the foregoing claims are paid. Plaintiff or the executor of his estate will review and approve each claim before it is paid. A reviewing fee of six percent will to be paid from the trust fund for that review.

Each owner seeking damages for EPA's taking is to be advised of this trust and its terms in order that they may take full advantage of it. The fund will terminate ten year after it is begun with the remaining funds to revert to plaintiff or his estate.

PAGE 11

If this action is successful, it may foreclose the use of these waivers in future actions, thus denying other injured parties the opportunity to recover damages beyond that of a taking. Therefore, plaintiff asks for this award to heal his injury, and by realizing others affected by this condition need recognition of their injury in

order to heal.

DEMAND NINE

Plaintiff asks the Court to allow him to further amend his complaint, after he retains an attorney, based on the outcome of the motions that will result from this complaint. If plaintiff is able to prove a prima facie case, then attorneys may be willing to handle this matter on a contingent fee arrangement. Since plaintiff cannot afford the estimated fees for dealing with this case, he is forced to handle the matter pro se.

DEMAND TEN

Plaintiff asks the jury for an award of punitive damages against the EPA, NJDEP, and Rockaway, either individually or collectively, in any amount it deems appropriate for defendant's intentional violations. If percentage of culpability is needed, then plaintiff asks the jury or the court to determine the percentage of culpability

DEMAND ELEVEN

Plaintiff prays the court award him legal fees for the attorney that will be used to deal with this matter after plaintiff makes a prima facie showing that he has been denied due process, equal treatment and for defendants violation of 42 USC 1983 and 2000d et seq. Plaintiffs request for attorney's fees is further supported by 42 USC 1988.

February 27, 1997

Nelson A. Fernandes

EXHIBIT a TO COMPLAINT

U.S.E.P.A.

DATE: APR 23, 1979

SUBJECT: Limited access interceptor sewers as they relate to the Construction Grant Program in New Jersey

FROM: Robert W. Hargrove, Soil Conservationist
NJ/PR Section, 2-WA-EI

TO: Daniel Sullivan, Chief
EIS Preparation Branch

THRU: Stephen Y. Arella, P.E., Chief
NJ/PR Section, 2-WA-EI

Limiting access to intercepting sewers is a complicated issue because of the broad latitude for varying legal Interpretations. If suitable controls could be implemented, it could be of great help to prevent Induced growth in environmentally sensitive areas.

This paper will deal with an overview of the situation. Court cases and New Jersey's State regulations and statutes will be explored. EPA options as they pertain to this subject will be explained. These options will be further illustrated by case studies In several EPA regions.

Sewage Disposal as a Public Service

The question of whether or not sewage disposal is a public service is an important consideration in determining the legality of limiting access. One important aspect is the source of funds. If, as in the past, the funds arise from local taxes, it is likely to be considered a public utility and limiting access would be difficult. However, since passage of the Clean Water Act, most of the design and construction of wastewater treatment facilities are financed by Federal grants. The remainder comes from state grants and bond issues which are recovered through user charges. Theoretically, facilities built using such financial backing could limit sewer hook-ups.

The issue of sewage disposal as a public service was also addressed in the courts. In Cloyes vs. Delaware Township it was noted "Sewage disposal is not one of the public services anciently

furnished by local governments, nor Is it uniformly so furnished today." This was further substantiated in Pleasure Bay Apartments vs. City of Long Branch, "Neither stat[illegible] nor case law impose; a mandatory duty on a municipality to f[illegible]h municipal service for disposal of garbage or other wastes:" These cases deal primarily with a municipality not being required to provide such service if none was provided in the first place.

New Jersey State Law

New Jersey's Sewerage Authority law enables counties or municipalities, either alone or in combinations, to establish a sewerage authority. Sewerage authorities are empowered to construct, operate and maintain facilities to collect, treat and dispose of sewage. The law specifies that these authorities have the power, "to enter into any and all contract, execute any and all instruments, and do and perform any and all acts or things necessary, convenient or desirable for the purpose of the sewerage authority or to carry out any power expressly given in this act."

The question of allowing hook-ups rests with both the authority and the municipalities. The authority is free to reasonably fix the terms and conditions oft service. The key word in this statement seems to be reasonably. A case from Arizona is a good example of this. In Travaini vs. Maricopa County the county concluded that the county "having installed and maintained a sewer line past the property in question, the city is thereafter required to allow any abutting property owner to use said sewer subject only to reasonable limitations." The "reasonable limitations" in this case being the capacity of the line.

The Arizona case deals with a collection system in a populated area, not an interceptor away from the population, and quite possibly in a sensitive environmental area.

It should be noted that in the case of Southern-Burlington County NAACP vs. Township of Mt. Laurel the courts have concluded that limited access interceptors can not be used as a means of exclusionary zoning.

New Jersey law states that sewerage authorities can be formed. The only stipulation concerning hook-ups is the abatement of pollution and related health hazards. Another consideration stemming from EPA's cost effectiveness guidelines is that hook-ups may be necessary for a system to be economically feasible.

State law does give to the authority the ability to enter into contracts. These contracts are primarily with municipalities for sewage collection and disposal. It seems to imply that they can also enter into contracts with EPA through grant agreements. These contracts stand on the same footing as contracts between natural persons or municipalities.

New Jersey Septic System Regulations

The Septic System Regulations of New Jersey also affect the issue. The state will not authorize the building of a septic system on a property If a sewer line is within 100 feet of it. With the exception of the general guidelines for sewer hook-ups, the sewerage authority determines sewer use.

EPA Authority

Protection of environmentally sensitive. areas is mandated by Federal policy. Certain actions can be taken to promote this policy with respect to the Construction Grants Program. The first and easiest mechanism is. to limit the capacity of the system to exlude development in environmentally sensitive areas. This is an attempt to limit the number of hook-ups to the system to areas where growth will not impact critical areas.

There will be some small projects that can not be limited with respect to carrying capacity because of minimum Sizing of unit processes for treatment. Projects such as these might require grant conditions. The conditions will have to be met in order to insure receipt of a. 201 grant.

The subject of grant conditions was addressed in PRM 75-26 which dealt with mitigating secondary impacts in the Construction Grants Process. The Regional Administrator can withhold of Step and 3 grants until effects, or agrees to conditions in the grant document requiring actions to minimize the effects.

Some actions to mitigate these secondary effects include, but are not limited to: phasing and orderly extension of sewer service, project changes improved land use planning, and sewer use restrictions. It goes on to say that conditions on a grant must be reasonable and the applicant must demonstrate "good faith" and be moving toward mitigative action before the grant is awarded.

Actions that can be taken if the applicant refuses to abide by the grant agreement are: withhold payments, refuse to process

subsequent grant applications from the municipality, refuse to approve grants for future phases of the projects, enter an injunction against the grant recipient, suspend project work or terminate the grant and recover unexpended EPA funds.

The new regulations (9/27/78) on Municipal Wastewater Treatment Works also contain provisions for conditions on grants. Section 35.935-16 on page 44073 states that "the Regional Administrator shall not pay more than 80% of the Federal-share of any Step 3 project unless he has approved the grantee's sewer use ordinance." This means 15% or more of the total project costs could be held if this is condition wasn't met. However, since this process now entails just a review of the ordinance for compliance with the regulation this may be of minimal value to us at this time.

Case Study Evaluation

Case studies from EPA regions show the various techniques that can be used to mitigate adverse impacts in the Construction Grants Program.

In 1975 a project from Region I on Block Island, Rhode Island could have encroached on environmentally sensitive areas. That region first scaled down the project. Then a grant condition was imposed to accept no new hook-ups from wetlands in accordance with the State law.

That same Year a project from Region III in Falling Creek, VA which involved the eutrophication of reservoirs and induced secondary effects on Swift Creek Reservoir. Plant size was reduced and the Step II grant was conditioned on the development of a Swift Creek Watershed Management Plan.

In 1975 a Region VIII project in Renner, SD was leading to new development on a floodplain. A grant condition, based on the county floodplain ordinance, that said no new hook-ups from the 100 year floodplain. The Region also recommended that capacity be limited to existing population plus a moderate increase.

In 1974 a Region IX project in Fairfield, CA included pressure to increase industrial and low density residential land on or near Suisun Marsh and pressure to develope agricultural land with impacts on air quality and wildlife. The Step 3 grant was conditioned to not provide service to new development immediately adjacent to the marsh based on pending State protection legislation..

In 1976 a Region X project in North Fremont, SD was leading to pressures to increase development in environmentally sensitive areas. These areas included fishing and wildlife management areas. The project was altered to have four small sub area facilities instead of one large Regional plant with long interceptors. The Step 2 and 3 grants were conditional on County compliance with State law requiring development of growth controls and a comprehensive land use plan.

Summary

Case studies show that EPA can and does use grant conditions and project changes to limit development due to funded projects. It should be said that if it is possible to base the grant condition on a state or local law then do it. This will take a lot of heat for such an action away from falling directly on EPA. Those laws could include floodplain ordinances (Block Is., RI) or complying with State requirements for land controls (North Fremont,' SD). Such conditions could be based on Federal law but this tends to foster the public opinion that the Federal government is just trying to control 'local zoning. State or local laws that apply to such situations should be added in to direct the public rage away from EPA, when possible.

Limited access interceptors is a question that has never formally been answered in the courts. to do so might require upwards of 3-4 years to make it through all appeals. The 'question is not entirely addressed in New Jersey State law either. The policy of protecting sensitive environmental areas can be fostered by changing the plan or imposing grant conditions. EPA has done this in the past and an analysis t-f these cases show how such problems can be handled in the future.

Recommended Regional Policy Options

1) Grant Conditions with 3rd party enforcement after grant expiration.
2) 208 plan inclusion of model local sewer use ordinance and adoption by local municipalities.
3) Approval of Sewer Use Ordinances by EPA.
4) Constraining service. agreements between MUA's and member municipalities.

EXHIBIT b TO COMPLAINT
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

DATE MAY 2 5 1979

SUBJECT Grant and Permit Conditions to Restrict Sewer Hookups in Environmentally Critical Areas

FROM Daniel Sullivan, Chief
EIS Preparation Branch

TO Conrad Simon, Director
Water Division

Scope of the Problem

EPA's funding of wastewater treatment works through the Construction Grants Program has been criticized for not adequately discouraging growth in environmentally sensitive lands (i.e. floodplains, wetlands, and significant wildlife habitats). In the past, the Agency's policy has been to eliminate any capacity in proposed systems that would serve these sensitive lands. However, in several cases this mitigating measure has proven to be inadequate to curb unsound growth.

Issue

Should EPA-Region ii begin to affix special conditions to Step 2 and 3 construction grants, 208 areawide plans, and 402 permits to prohibit development in environmentally critical areas?

Salient Factors

The September 27, 1978 Construction Grants Program Rules and Regulations specifically encourages the use of grant conditions restricting sewer hookups to protect environmentally sensitive land from new development. However, because some of the legal complexities associated with such grant conditions, Region II has

never exercised this control. We now have several Ideal examples where such conditions are both appropriate and easily justified.

Unfortunately, merely limiting the size of wastewater treatment facilities does not adequately protect sensitive areas. An excellent example of how a reduction in facilities capacity has a very limited influence on where housing and sewer hookups can occur Is the proposed Cape May Region project. The EPA had reduced the size of the proposed facilities to specifically exclude wetlands, flood hazard areas, and significant wildlife habitat areas from development. Yet, an application for a 250 unit residential development (in the flood hazard area - see attached Map 1) is currently before the New Jersey Department of Environmental Protection. Discussions with DEP personnel reveal that the developer intends to rely on the proposed regional- sewer system to satisfy the wastewater treatment need of the proposed housing project.

Major Actors

1. USEPA-Region II (RA, WDD, RC)
2. U.S. Fish and Wildlife Service
3. New Jersey Department of Environmental Protection
4. Loc-al Municipalities
5. 208 Agencies
6. Natural Resources Defense Council
7. American Littoral Society
8. Na;tional Wildlife Federation

Political Considerations

Grant conditions of this type have been used in other regions but have relied heavily upon State Law for their enforcement (see Attachment 1).New Jersey State Law does not adequately protect environmentally sensitive areas primarily because federal regulations encompass more types of sensitive areas. However, there are strong statements in the New Jersey Water Pollution Control Act (NJWPCA) Regulations which mandate conformance

of future 201 grants with applicable 201, 208 and 303 plans.

EPA has a clear mandate in law, regulation, executive orders and EPA Policy (see Attachment 2) to protect the following critical areas:

1. Significant Habitats of Wildlife, including Rare and Endangered Species Habitats - E dangered Species Act and Fish and Wildlife Coordination Act
2. Floodplains - Executive Order 11988
3. Wetlands - Executive Order 11990

We also have some rather strict policies on protection of prime agricultural lands (EPA Policy Statement - September 26, 1978) and less strict policies on other sensitive areas, such as steep slope areas and unique vegetational communities.

There- are a number of Influential national interest groups that have been actively prodding EPA to apply such conditions. Among these are:

1. Natural -Resources Defense Council
2. American Littoral Society
3. National Wildlife Federation

In addition, the U.S. Fish and Wildlife Service has also expressed their opinion that grant conditions of this type should be used to protect the unique ecological nature of the Cape May Region.

Background

EPA-Region II has been reticent in applying such conditions in the past for several reasons. Most New Jersey facility planning grants are given to Municipal Utility Auth. (MUAs) established through State Law. Some questions have been raised as to whether or not an MUA can accept • condition which affects land use controls and, If they can, whether the condition is enforceable against its member municipalities The NJSA 40:14A-23 (see Attachment 3)

appears to permit the MUA to accept such conditions. Another frequent objection to the use of the grant conditions has been that the duration of the enforcement of a grant condition expires at the end of the grant period. However, since many of our grants are phased, the applicability may well be extended for considerably longer period than the Initial grant.

Admittedly, limiting access to interceptors or collection Systems via grant conditions themselves will not guarantee better land use planning. However, it is an essential element of a multi-pronged approach to resolving this problem.

The NPDES Proposed Revision of Existing Regulation published in the August 21, 1978 Federal Register requires discharge permits to be consistent with the reflective of the Clean Water Act and any appropriate Federal Executive Orders. It also states that permits should include more stringent requirements where necessary to insure consistency with areawide waste treatment management (208) plans (AW'TMP). Many existing permits are expiring in the near future and, prior to reissuance, considerable effort is anticipated to assure consistency with both 201 facilities plans and 208-funded AWTMP's

Recommendations

Based on the May 24 briefing on the Cape May regional project, the following represents my understanding of the direction set by Eckardt C. Beck. The activities proposed can and should be initiated concurrently and are not necessarily contingent upon the success of the other parts for their effectiveness.

First, where the review of 201 facility plans (including EASs) identifies environmentally sensitive areas requiring protection, grant conditions should be affixed specifically constraining sewer hookups. We anticipate that detailed maps of the facility planning area will be used to identify sensitive areas and existing discharges (I.e. homes and subdivisions) There are two New Jersey 201s In-house that are excellent examples of the need for such conditions: Jakes's Branch Interceptor and Stafford Township Collection System.

The proposed Cape May Region Wastewater Treatment Facilities Plan requires a slightly different approach. A negative declaration was issued on January 25, 1979. The use of a special conditlon restricting sewer hookups represents a substantial change from the statements made in the negative declaration. Once the facility plan is revised to show which specific lots will Le served by the proposed facility, we will issue an addendum to the negative declaration specifically detailinq our intent to use grant conditions. The addendum will allow far a 30 calendar day comment period.

Second, the 208-funded areawide waste treatment management plans (AWTMP) for these areas should be required to reflect the need to protect these sensitive areas. In order to accomplish this in the Cape May Region, the 208 agency should adopt the revised 201- plan as part of the AWTMP. No Step 3 grant will be awarded to the CMCMUA until this portion of the AWTMP is approved by EPA. We intend to send a letter to the Cape May 208 agency informing them of this requirement.

Third, the Permits Branch, In coordination with Regional Council, should develop permit conditions to reflect sewer hookup restriction which are detailed in the special grant condition for the Step 2 201 grants. Permits 8ranch should also develop a strategy for indentifying future permit violations, e.g., if a connection occurs from an area defined to be environmentally sensitive.

Pros and Cons

Pros: Use of grant conditions and subsequent enforcement will clearly demonstrate EPA's intent to protect environmentally sensitive areas. Even if we had to rely on third party enforcement of the conditions, it would provide a firm legal basis for future adjudication.

It is responsive to valid concerns presented by NROC, ALS, NWF, and USFWS. Failure to respond to their inquires is likely to result in litigation on at least on in-house project (Cape May Region).

Once established, the use of grant conditions will streamline the 201grants process. - Projects are frequently delayed because of concerns that sensitive areas have not been adequately protected (e.g. Cape May Region).

Projects which may prove more cost effective on a regional rather than subregional basis may no longer be channeled away from single plant schemes solely to protect environmentally sensitive areas.

Cons: Grant conditions of this type have never been used In Region II before and there is a potential for litigation concerning the legality of federal intervention in local land use planning.

These conditions may not be enforceable by EPA beyond the life of the current grant. However, in many cases, we anticipate future grants to the affected MUAs. Furthermore, a grant condition may be enforceable after the grant expires because it is a contract between EPA and the authority.

State acceptance of these conditions is complicated by the fact that they define sensitive areas differently than EPA defines them. Application of this process to other 201s, 208s and permits in the region is a manpower intensive effort.

Strategy and Timetable

1. Affix grant conditions to the two pending New Jersey 201 grants mentioned earlier, immediately.

2. Require the CMCMUA to revise the Cape May Region facility plan.

3. Issue an addendum to the Cape May Region Negative Declaration.

4. Require the 208 agency to work with the CMCMUA to assure adoption of the revised 201 plan prior to October 1, 1979.

5. Negotiate with the State to require them to amend its regulations to redefine environmentally sensitive areas to agree with the federal definitions through the

State/EPA Agreement process.

6. **Negotiate with the State to require them to amend its review procedure to reject grant applications and deny sewer extension permits which would serve sensitive areas through the 205(g) Delegation Agreement.**

7. Require all 208 grantees to give high priority to the identification of environmentally sensitive areas where largescale development is projected.

Additional Attachments

1. Basis in Regulation, Executive Order and EPA Policy Supporting the Use of Grant Conditions to Protect Environmentally Critical Areas.

2. April 23, 1979 memo from R. Hargrove to D. Sullivan discussing potential use of grant conditions to limit access to interceptors.

3. Article excerpted from New Jersey Effluents (April 1979) entitled "Limited Access Interceptors?"

cc: Peter Devine
William Muszynski
Helen Fenske
Pat Harvey
Charles Durfor
Dave Luoma
Richard Salkie
Mike Bonchonsky
Kevin Bricke
Steve Arella

EXHIBIT c TO COMPLAINT
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON. D.C. 20460

July 11, 1980

MEMORANDUM

SUBJECT: Region II Policy on Protection of Floodplains and Wetlands Wetlands
FROM: Eckardt C. Beck, Assistant Administrator
For Water and Waste Management (WH-556)
To: Charles S. Warren, Regional Administrator
Region II

This office has reviewed Region II's Policy on Protection of floodplains and Wetlands and finds it to be a consistent application of national EPA policy.

As is aptly stated in the Regional policy, President Carter has called for the preservation and restoration of our Nation's floodplains and wetlands. In order to accomplish this goal, no Federal agency should encourage, in any way, the development of a floodplain or wetland.

Nationally, EPA has implemented this policy by stating that unless there is no "practicable alternative," floodplain or wetland development should not be encouraged either directly or indirectly. Statement of Procedures on Floodplain Management and Wetlands Protection, 44 FR 1455 (January 5, 1979).

More specifically, the construction grants program regulations provide detailed guidance for dealing with environmentally sensitive areas, including floodplains and wetlands. The regulations regarding funding of both collectors and interceptors are unequivocal in their support for preservation of these sensitive areas. See 40 CFR Sec. 35.925-13(e) (collectors); 40 CFR Part .35, Appendix A, Sec. 8(f)(l) (Interceptors). Both of these sections also establish the propriety of using appropriate and effective grant conditions (e.g. restricting sewer hoohups) . . . to protect environmentally sensitive areas ... from new

development

Additionally, the Agency has a long-standing policy requiring the delination and mitigation of secondary environmental effects, including changes in population and economic growth and land use." PRM 75-26, consideratlon of Secondary Environmental Effects in the Construction Grants Process.

Your Regional policy provides for a general prohibition of sewer hookups on undeveloped portions of floodplains and wetlands. In certain, well-defined circumstances, exemptions may be granted by the Regional.Administrator. Enforcement is provided by using grant conditions which are enforceable by private parties for the life of the treatment works. Finally, these conditions may not be imposed until a full public hearing is conducted.

Each of these criteria -- and the policy as a whole-- is consistent with existing Agency policy. That policy permits and encourages the use of grant conditions to limit sewer hookups in environmentally sensitive areas. The public hearing requirement and the provisions for exemptions are ways of limiting the harshness of the policy and minimizing the burden on the public.. Those policies are wholly consistent with the overall duties of minimizing the harm to the environment and providing service for the public. It may also be noted that the mapping requirements set forth in the Regional policy do not impose an excessive burden on grantees, since they must presently prepare the same lot-by-lot maps for tax assessment purposes.

Having thoroughly reviewed the Region II policy, I commend you for developing a policy to meet your Regional needs that, at the same time, are consistent with national policy.

EXHIBIT d TO COMPLAINT
State of New Jersey

DEPARTMENT OF ENVIRONMENTAL PROTECTION

TRENTON
Division of Coastal Resources

Please address reply to
CN401
Trenton, N.J. O8625-0401

October 21, 1988
Mr. Nelson Fernandes
26 Watts Avenue
Denville, N.J. 07834

Re: **Freshwater Wetlands Exemption Letter**
Nelson Fernandes
BFW File No. 1435-880572.1-EX
Rockaway Township; Morris County Block 20504; Lot 8
Rockaway watershed; Passaic River drainage basin

Dear Mr. Fernandes:

This acknowledges receipt of your exemption request and the issuance by the 11. 5. Department of the Army, Corps of Engineers of a Nationwide Permit conditional approval file #87-0314-J3 and dated September 17, 3987, for the subject property. The federal conditional approval required that a jurisdiction determination (verification of the extent and location of wetlands and waters in relation to the Project activity) be performed by the New Jersey Department of Environmental Protection, Bureau of Freshwater Wetlands.

Based upon the information received, the wetlands affected by the Corps approved activity were found to be consistent with those shown on the plan submitted for approval under Nationwide Permit #26. In accordance with an agreement between thee New Jersey Department of Environmental Protection and the U.S. Army Corps of Engineers Philadelphia and New York Districts, the

above referenced plan accurately identifies only the extent of State and Federally regulated waters and wetlands to be effected by the proposed activity under the Corps' Nationwide permit. **Therefore, the activities referenced in the ACOE approval letter are exempt from the requirement of obtaining a NJDEP Freshwater Wetlands Permit pursuant to N.J.A.C. 7:7A-2.7(g).** This exemption however, is subject to the following limitations:

1. This exemption does not obviate the need for any permits, approvals, or certifications required by any other Federal, State, county, or municipal review agencies with jurisdiction over this project. The exemption applies only to the requirements of the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq. and the rules adopted pursuant to that Act, N.J.A.C. 7:7A et seq.

2. If any discharge of dredged or fill material covered by t-1~is exemption letter contains any toxic pollutant listed under section 307 of the Federal Clean Water Act, this exemption shall be void and such discharge shall be subject to all applicable State and Federal toxic effluent standards or prohibitions, and shall require a NJDEP Freshwater Wet lands Permit.

3. This exemption shall remain in effect for that period time for which the above mentioned Corps approval letter is effective. Also, the U. S. Army Corps of Engineers retains the right to modify the Federal jurisdiction determination at any time, should the site conditions change.

4. The U.S. Army Corps of Engineers has permitted you to disturb 0.3 of an acre of freshwater wetlands and waters. Any additional disturbance to freshwater wetlands or waters on or adjacent to the properties referenced in this letter will be a violation of the New Jersey Freshwater Wetlands Protection Act (N.J.S.A. 13:9B-1 et seq.).

This exemption applies only to those activities for which authorization was specifically requested from the ACOE. This exemption does not approve or verify any other wetlands delineation which may have been prepared for the site. This

exemption only applies to those wetlands/water encroachments that are depicted on the plan titled Minor Subdivision, dated March 18, 1987. 1£ you wish to have the whole wetlands 1ine on the site verified, then you must request a NJDEP Letter of Interpretation.

The Act provides for penalties of up to $10,000 per violation, per day for violations of the Act, in addition to requiring removal of any illegal structures, fill, etc. and waters as provided under N.J.A.C. 7:7A.

5. If the information on which this exemption is based is found to be Inaccurate, or if the Corps' approval is terminated or revoked for any reason] the department reserves the right to void this exemption.

If you have any further questions regarding this exemption please contact Molly Gurien at (609) 984-0853.

Sincerely,

Robert Piel Jr., Chief
Bureau of Freshwater Wetlands

cc: U.S. Army Corps of Engineers: New York District
Rockaway Township Municipal Clerk
Rockaway Township Construction Official
Morris County Planning Board
Susan Pleibel, NJDEP Bureau of Program Development and Technical Services

EXHIBIT e TO COMPLAINT

State of New Jersey
DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF WATER RESOURCES
CNO29
Trenton, N.J.08625-0029
George G. McCann. P.E.
Director

April 1, 1989

William P. Lawler, P.E., Chief
U.S. Environmental Protection Agency
Region II
26 Federal Plaza
New York, New York 10278

Dear Mr. Lawler:

Subject: Rockaway Valley Regional Sewerage Authority
Waiver Request - Additional Information
Rockaway Township - Block 20504, lots 8 and 9
Project No. C340389-04

A site inspection was performed on March 15, 1989 for the aforementioned property as per your request. This letter was prepared in order to notify your office of the findings of said investigation.

It appears that the wetland delineation on the property is appropriate. With the exception of the steeply sloping portions of the lots, which parallel the roads, the entirety of the property is wetlands. Additionally, several small streams run through the property to the adjacent drainage easement. This drainage easement runs into White Meadow Lake.

The surrounding lots are all developed with the exception of lot 7, which is immediately adjacent. The 100 to 150 feet closest to the road of each lot is cleared and developed. The lots are 275-419 feet deep, therefore, approximately 125-269 feet behind each home has been

left in a natural state. The attached map (Attachment 1) shows the approximate extent of the natural area, which remains surrounding the drainage easement. Review of detailed ESA mapping from Rockaway Township shows a smaller extent compared to the field verification but a similar wetland configuration (included as Attachment 2). Through this, the lots are shown to be a part of a larger wetland.

As a result of this investigation, I would like to reconfirm the previous recommendation to deny the request for a waiver from the grant condition for this property.

In addition, an informational letter has been received from the owner as a supplement to the waiver request. This letter is enclosed for your review.

If you have any questions or problems concerning this matter, please contact Gabrielle Fay at (609) 633-1170.

Very truly yours,

Barbara Hirst, Chief
Technical Services Section
Municipal Wastewater Assistance Element

GF:BH:dc

Enclosures

EXHIBIT f TO COMPLAINT
MAY 5 1989

Mr. William H. Francisco, Jr.
Executive Director
Rockaway Valley Regional Sewerage Authority
99 Green Bank Road, R.D. 1
Boonton, New Jersey 07005

Dear Mr. Francisco:

This is in response to the Rockaway Valley Regional Sewerage Authority's (RVRSA) request for a waiver from the special grant condition that (Grant No. C-34-389-04) prohibits sewer connections from new structures in environmentally sensitive areas (ESAs). The request is on behalf of Nelson and Joan Fernandes, the owners of Block 20504 (formerly Block 34), Lot 8, a 18,900 sq. ft. undeveloped parcel located in the Township of Rockaway, Morris County, New Jersey.

As you are aware, the intent of the special grant condition is to protect ESAs (in this case wetlands) from: Sewer-induced development. When reviewing requests for waivers from the grant condition, we consider various factors such as the quality of the wetlands, the size of the property, and the extent of existing development surrounding the property, on a case-by-case basis

We have carefully evaluated all the information accompanying the request, as well as the analysis provided by the New Jersey Department of Environmental Protection (NJDEP) in its recommendation for denial of this waiver. Our review of the information provided to this office by the NJDEP indicates that the property contains approximately 10,800 sq. ft. of palustrine forested wetlands. These wetlands are part of a larger undeveloped contiguous wetland system delineated by the U. S. Fish and Wildlife Service. According to the applicant, these wetlands would be filled in to accommodate a proposed single family hone, and an associated rear yard to comply with current zoning regulations.

After consideration of the above, we must deny the request for a waiver from the grant condition because of the ecological value

and extent of the wetlands that would be adversely impacted if this property were to be developed as presently proposed.2

If there are any questions regarding this decision, please contact Mr. Robert Hargrove, Chief, Environmental Impacts Branch, at (212) 264-1892.

Sincerely,

"s/William J. Muszynski, P.E.

Acting Regional Administrator

cc: Commissioner C. Dagett, NJDEP
B. Hirst, NJDEP-CGA
D. Nelson, Upper Rockaway River Watershed Assoc.
N. & J. Fernandes

bcc: M. Delvicario, 2WM-MWP
J. Mello, 2WM-NJMP

EXH. L June 22, 1995 Notice of Appeal

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW JERSEY

FULL CAPTION IN DISTRICT COURT DISTRICT COURT

Nelson Fernandes
V.
Rockaway Township, et al

DOCKET NUMBER 94-338
DISTRICT COURT
JUDGE W.H. Walls

NOTICE OF APPEAL
TO
U.S. COURT OF APPEALS
THIRD CIRCUIT

Notice is hereby given that Nelson Fernandes appeals to the United States Court of Appeals for the Third Circuit from Order dated 5/11/95 and Order on Reconsideration 6/19/95 of the United States District Court, District of New Jersey, entered in this action on May 11, 1995, June 19, 1995.

DATED: June 22, 1995

Nelson Fernande
9 Fox Run
Denville, N.J. 07844
(201) 627-2138

EXH. M Page 5 of the Appellate Brief

Other Applicable Standards of Review

The following standards apply generally to all arguments, and may be referred to by the following no.'s in specific arguments.

1.""We cannot affirm the dismissal unless we can "say with assurance that under the allegations of the *pro se* complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" Haines v. Kerner, 404 U.S. 519, *520* (1972); (quoting Conley v. Gibbons, *355* U.S. 41, *45-46* (1957).

2.Court of Appeals exercises plenary review over district court's grant of motion to dismiss for failure to state a claim. Silverman v. Eastrich Mult. mv. Fund. L.P., 51 F.3d 28 (C.A.3 1995).

3. In considering whether complaint should have been dismissed for failure to state a claim on which relief can be granted, Court of Appeals must consider only facts alleged in complaint and accept all allegations as true. ALA. Inc. v. CCAIR. Inc., 29 F.3d *855* (C.A.3 1994)

When reviewing complaint on motion to dismiss for failure to state a claim, court should consider not only allegations in complaint itself, but also exhibits attached to it

which complaint incorporates. F.R.C.P. 12(b)(6) .Id.

4. It is not necessary for plaintiff to plead evidence or facts that serve as the basis for the claim. Hakimoglu v. Trump Taj Mahal Assoc., 876 F.Supp. *625,* affirmed 70 F.3d 291.

5.The appellate court's role is to insure that the idiosyncrasies of the district judge and momentary lapses of judgment do not undercut the administration of justice. Cf. Anderson v. City of Bessemer City, 470 U.S. 564, 573-75 (1985).

6.An abuse of discretion involves "a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of the law to fact." International Union. UAW v. Mack Trucks. Inc., 820 F.2d 91, 95 (3d.Cir.1987); Valenti v. Mitchell, 962 F.2d 288, 299 (3d. Cir. 1992).

7."The court's task is not to rule on the merits of plaintiffs claims, but to decide whether, presuming all factual allegations in the complaint to be true, and drawing all reasonable inferences in the plaintiffs favor, the plaintiff could prove any set of facts which would entitle him to relief." Weiss v. Wittcoff, 966 F.2d 109, 112 (2d.Cir.1992). *See* Arcade Water Dist. v. U.S., 940 F.2d 1265 (9th.Cir.1991); Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d,Cir.1993); Rocks v. Philadelphia, 868 F.2d 943, 944 (3d.Cir.1984).

EXH. N Page 36 of the Appellate Brief

XVIII District Court Erred By Ruling on Plaintiffs Arguments Instead of his Complaint

Summary of Argument: The district Court erred as a matter of law by ruling on the merits of the arguments in opposition to defendant's motion, instead of the allegations in the complaint.

Standard of Review: See Other Applicable Standards of Review No. 6.

"The court's task is not to rule on the merits of plaintiffs claims, but to decide whether, presuming all factual allegations in the complaint to be true, and drawing all reasonable inferences in the plaintiffs favor, the plaintiff could prove any set of facts which would entitle him to relief." Weiss v. Wittcoff, 966 F.2d 109, 112 (2d.Cir.1992). *See* Arcade Water Dist. v. U.S., 940 F.2d 1265 (9th.Cir.1991); Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d.Cir.1993); Rocks v. Philadelphia, 868 F.2d 943, 944 (3d.Cir.1984); Johnson v. Cullen, 925 F.Supp. 244.

A court must *read complaint generously,* accept all allegations as true, and construe them in a light most favorable to plaintiffs. Jordan v. Fox. Rothschild. O'Brien & Frankel. 20 F.3d 1250, 1261 (3d.Cir.1994); Johnson v. Cullen, 925 F.Supp. 244, 247 (D.Del.1996)

Discussion: The opening paragraph of the court's analysis contains an admission that invalidates its entire opinion. The court states, "The federal defendants move for dismissal of Fernandes' Complaint on the grounds of res judicata, lack of subject matter jurisdiction, failure to state a claim upon which relief may be granted, and the applicable statutes of limitations. The Court has considered all the arguments raised by Fernandes in opposition to the motion and finds them to be without merit. Therefore, dismissal is warranted." (Exh. A.- Opinion, p.7)

Plaintiff argued that the court below failed to read his complaint because the court's findings were so off the mark from the allegations, that it supported such a conclusion. During plaintiffs final review before stapling this brief, plaintiff found the court admits it failed to read the complaint. Plaintiff overlooked this admission by addressing each specific issue, instead of the court's overview. The court admits that it, **"has considered all the arguments raised by Fernandes in opposition to the motion and finds them to be without merit. Therefore, dismissal is warranted." Consequently, this unequivocal admission renders its opinion as to each issue invalid, since it admits that it failed to comply with its duty to read the complaint.**

EXH. O Dismissal had no Res Judicata Effect

V – The 1994 Suit Did Not Culminate in a Final Judgment on the Merits

Summary of Argument: The court errs by finding the 1994 suit culminated in a final judgment since it dismissed plaintiffs damages claim without prejudice and without terms.

Standard of Review: A ""[D}ismissal without prejudice" is a dismissal that does not 'operate" as an adjudication upon the merits,". and thus does not have a res judicata effect. nor a 'term or condition" placed upon the dismissal (which was unconditional). Cooter & Gell v. Hartmax Corp., 110 S.Ct. 2447, *2456,* 2460 (1990). When a discretionary ruling is based on an error of law, abuse of discretion is established." *id*

A district court cannot reconsider or modify orders after they are affirmed by an appellate court. U.S. v. Minicone, 26 F.3d 297, 300 C.A. 2 (N.Y.); Benson v. Benson, 624 A.2d 644, 647.

Discussion: The court contends, 'the 1994 suit before this Court culminated in a final judgment on the merits" (Opinion, p.9). However, the court dismissed plaintiffs damages claim alleging a violation of the CWA without prejudice and without terms (Exh. B). A dismissal without

prejudice or terms operates to leave the parties as if no action had been brought at all. Moore v. St. louis Music Supply Co., Inc., *539* F.2d 1191, 1194 (1976). If a claim is dismissed for a defect in pleading or want of jurisdiction then the judgment rendered will prove no bar to another suit. Costello v. U.S., *365* U.S. *265,* 286 (1960). Since the district courts May 11, 1995 order (Exh. B) shows it did not reach the merits of the claim that was dismissed without prejudice or terms, plaintiff is entitled to file a second suit, and is thus entitled to rely on the waiver of immunity in the citizens suit section of the CWA that the court barred on res judicata grounds (Opinion, p.10). Etten v. Lovell Mfg. Co., 225 F.2d 844, 846 (3d.Cir.1955); Compagnie Des Bauxites De Guinee L'I Jnion, 723 F.2d 357 (3d.Cir. 1983). The district court had every opportunity to impose terms or rescind the dismissal without prejudice in its Aug. 24, 1995 order (Exh. D) as part of granting EPA's motion for partial summary judgment. By reaffirming the dismissal without any terms on Aug. 24th., means the court explicitly barred the use of res judicata based on the partial summary judgment. Moreover, a district court is barred from modifying its earlier order that dismissed plaintiffs claim without prejudice, since that order was affirmed by this Court (Exh. E). U.S. v. Minicone, 26 F.3d 297, 300 C.A. 2 (N.Y.); Benson v. Benson, 624 A.2d 644, 647.

EXH. P Law of the Case Argument

VI Court and EPA Failed to Comply with Law of the Case

Summary of Argument: Dismissing on res judicata grounds would violate the law of the case doctrine. Moreover, EPA waived its res judicata defense by not appealing the former orders.

Standard of Review: Conflict issue under law of the case doctrine is reviewed for abuse of discretion, but question of whether conflict exists is legal issue subject to plenary review. Coca-Cola Bottling Co. of Shreveport. Inc. v. Coca-Cola Co., 988 F.2d 414, Certiorari denied 114 S.Ct. 289, 126 L.Ed 2d 239. District Court abused its discretion when action taken was improvident and affected substantial rights of plaintiff. Goetz v. Crosson, 41 F.3d 800.

Discussion: The district court dismissed without prejudice and without terms, the damages claims against the EPA in its May 11, 1995 order (Exh. B). It reaffirmed that ruling in its denial of reconsideration on June 19, 1995 (Exh. C), and its order granting EPA partial summary judgment on Aug. 24, 1995 (Exh. D). By restating the dismissal without prejudice or terms, the court was restating plaintiffs right to bring this action without regard for the partial summary judgment. Law

of the case rules apply to subsequent rulings by the same judge in same case or closely related one. Casey v. Planned Parenthood of Southeastern Pa., 14 F.3d 848, stay denied 114 S.Ct. 909, 127 L.Ed. 2d 352. The order dismissing without prejudice was reviewed by this Court and affirmed, thus providing plaintiff with a substantial right which bars the district court from now trying to modify its former order. U.S. v. Minicone, 26 F.3d 297, 300 (C.A.2); Chevron U.S.A.. Inc. v. Traillour Oil Co., 987 F.2d 1138 (C.A.5 1993). Benson v. Benson, 624 A.2d 644, 647. Dismissing plaintiffs claim at this point represents a failure to adhere to its prior ruling. Aguinaga v. United Food and Comm. Workers Intern. Union, 854 F.Supp. 757, aff. as modified 58 F.3d 513 (1994). Law of the case also prevents collateral attacks on court's ruling, thus allowing plaintiff to rely on the waiver of sovereign immunity in citizen suit section and the civil rights claims against EPA and NJDEP. Pegues v. Morehouse Parish Sch. Bd., 706 F.2d 735.

Moreover, EPA waived its right to apply res judicata by not appealing the Aug. 24 th. order that reaffirms a dismissal without prejudice or terms that insulates it from res judicata based on the partial summary judgment in the same order. Griffin v. Mich. Dept. of Correct., 5F.3d 186; Fusco v. Rome Cable Corp., 946 F.Supp. 171, 176 (N.D.N.Y.).

Exh. Q - Certification

UNITED STATES SUPREME COURT
OF THE UNITED STATES

Nelson Fernandes,	:	
Petitioner,	:	Civil Action
- vs -	:	No 97 - 5579
Rockaway Township Town Council;	:	
EPA; Administrator of the E.P.A.;	:	**CIVIL ACTION**
Regional Administrator for Region II;	:	
Commissioner of the NJDEP &	:	
Attorney General,	:	**Petitioner's**
Respondents.	:	**Certification**
	:	

Nelson Fernandes
9 Fox Run
Denville, N.J. 07834

The following facts are based on my personal knowledge, since I prepared the pleadings, briefs and motions in this and the former case This certification addresses conduct by the district and appellate courts, which indicates a deep-seated bias and deliberate denial of due process.

1) The errors made by the panel on review were vexing. When the panel refused to correct plain errors in the motion to recall, I realized the original errors were intentional in order to deny me due process. I believe the following conduct proves an extra-judicial bias and a deliberate denial of due process;

a) The motion to recall reviewed the following; the claims in the 1995 bench ruling that would be res judicata (Exh. J, p. 41); the allegations against Rockaway (Exh. K,p.58-60) which involve an invalid ordinance and illegal assessment, neither of which are listed in the 1995 ruling; neither of which has anything to do with the 1985 purchase of land from Rockaway as the panel

affirmed (Exh. C.p.7-8). This proved the panel's refusal to read the complaint pursuant to standards of review in the appellate brief (Exh. M) denied me the opportunity to prove the district court also failed to read the complaint and its own opinion before finding res judicata and imposing a sanction.

b) Exhibit M was part of the motion to recall. It shows page 5 of my appellate brief cited standards of review that required reading the complaint, accepting the allegations as true, and determining if the district court abused its discretion. By disregarding these standards of review in the appeal and the motion to recall the panel denied me the opportunity to prove the district court did not read the complaint and that affirmation of the dismissal violates Hanes v. Kerner, as well as being unjust.

c) Exhibit N was part of the motion to recall. It shows page 36 of my appellate brief argued that the district court failed to read the complaint. That argument repeated the standards of review by reference. Since the same standards appear on pages 5 and 36 it is highly unlikely that three experienced appellate judges would coincidentally overlook both, which indicates the panel refused to read the complaint to avoid district court errors.

d) Judge Becker's opinion outlines the standard applied to the sanction, but is silent on the standard applied to the complaint. This shows the panel was concealing the fact that it disregarded the Supreme Court ruling that required reading the complaint and the other standards of review in order to mislead me into believing they applied those standards, in order to prejudice

my petitions for rehearing and certiorari.

e) I cited standards of review that limited the panel to the allegations in the complaint and the attached exhibits. They required reading the complaint and accepting its allegations as true in order to determine if the district court abused its discretion. There was no need for me to argue what was overlooked since comparing the allegations to the district court rulings would make that clear. Hence, the panel's refusal to read the complaint in the appeal and in the motion to recall has denied me the review required by those standards, thus denying me due process.

f) Though not stated in the opinion, the panel appears to have given deference to the district court rulings, which violates the authorities cited in the appellate brief. It is also violates the authority cited in the motion to recall which requires a panel to apply a standard of review only when standards are not provided by the parties. The panel's refusal to read the complaint in both proceeding proves a deliberate violation of these authorities and its refusal to provide a meaningful review.

g) Silently applying a deferential standard after arguing the district court's failure to read the complaint (Exh. N) proves it willfully denied a meaningful review.

h) The district and appellate court's refusal to read the complaint avoids allegations that toll the statute of limitations (Exh. K, p.57). Its findings on the sanction and res judicata in Rockaway's favor is contrary to the allegations in the complaint (Exh. K, p.58-60) which are unrelated to the claims in 1995 ruling

(Exh. J, p. 41). So, there is no former claim to warrant a sanction. So, failure to read the complaint by both courts pursuant to Haines v. Kerner proves I was denied the required review.

i) Three appellate judges overlooked standards of review in the appellate brief that require reading the complaint. They also disregard the claim that the district court failed to read the complaint, they also failed to state the standard applied to the complaint, yet they give the district court opinion deference by affirming its rulings. These facts support the inference that the panel deliberately refused to consider these facts in order to deny me any review in order to arrive at the decision it wanted to render. I made the panel aware of its error in the motion to recall. Yet, the panel denied the motion instead of correcting its failure to read the complaint, knowing the allegations would prove the district court failed to read the complaint, which means the panel knew it had denied me any review so that I would remain subject to the unjust sanction.

j) Judge Walls overlooked key allegations in the complaint, which proves he deliberately disregarded the complaint, because the appellate panel would cover it up. In other words, his conduct indicates an unstated conspiracy in the federal judicial system to deny pro se litigant's due process in order to dispose of cases against federal agencies by motion.

k) The foregoing facts indicates the panel read the complaint as required by *Haines v. Kerner* because it had no reason to believe the district erred. Upon finding the district court

abused its discretion on three of the issues that ultimately appear in its opinion, the panel deliberately applied a deferential standard so it could affirm those issues in support of an unstated conspiracy with district courts.

l) The panel denied the motion to recall because it knew its opinions on the statute of limitations, res judicata in Rockaway's favor, and the sanction would have to be recalled, which would defeat its initial denial of due process.

m) The motion to recall pointed out that the 1997 district court opinion (Exh. D, p.13-14) that was reviewed by the panel, states the following about its March 1995 bench ruling, **"It also found the challenge to the EPA grant condition time-barred by a six year statute of limitations imposed by the APA."** That opinion goes on to state **"by Letter Order dated August 24, 1995, the Court granted summary judgment in favor of the United States, finding the EPA had not acted arbitrarily and capriciously when it denied Fernandes' waiver request."** From this reading the panel knew the district court denied me any opportunity to be heard by first barring the APA claim on statute of limitations grounds, then granting summary judgment on the APA claim (Exh. G, p.33) it barred. To refuse to sua sponte correct this clear denial of due process on appeal, and to now refuse to recall an order that remains void in three ways further proves bias and a refusal to provide a meaningful review.

n) By overlooking; citations that require reading the complaint, accepting the allegations as true, determining if the

district court abused its discretion, and a clear denial of due process in the 1997 district court opinion, the panel created the issues it affirmed. These issues could have been **clear instances of previous error** by the panel if not for their refusal to correct the substantial prejudice created by their actions in the motion to recall, proving the original conduct was motivated by bias.

o) The district court's 97 opinion states that the APA claim was barred by its 1995 statute of limitations ruling. It then admits granting summary judgment contrary to that bar in August 1995. So, the district court in 1997 admits it denied me any review in 1995. Its admitted knowledge of the statute of limitations ruling which does not appear in any of the orders (Exh. G-I) together with the May dismissal without prejudice (Exh.I) ended the court's jurisdiction in 1995. Moreover, granting summary judgment two months after I filed my notice of appeal in 1995 (Exh.L) also ended the district court's jurisdiction, proving it lacked jurisdiction to enter its August order. By granting summary judgment when it lacked jurisdiction in three ways proves a deliberate effort to deny due process. Moreover, its application of res judicata and a sanction in 1997, as well as overlooking tolling allegations in the complaint creates to such a body of evidence as to prove a deliberate bias by the district court.

p) The 1995 statute of limitations bar does not appear in the 1995 orders (Exh. G-I). So, I was denied the opportunity to appeal that bar by having to appeal the August 95 order granted in violation of that bar, which taints the affirmation of that order.

Since that order is void, the statute of limitations ruling cannot be used as grounds for the continued application of res judicata, since I was denied due process by not being able to appeal the statute of limitations bar through no fault of my own.

q) I reviewed the transcript of the 1995 district court ruling as it relates to Rockaway to be absolutely sure the claims in the complaint were unrelated to those reviewed by the court so as not to violate res judicata. Therefore, I state unequivocally that the district and appellate courts failed to provide me with the review contemplated for a motion to dismiss for failure to state a claim and the de novo review I compelled on appeal.

r) Mr. Higgins' knew the panel's opinion on the 1985 purchase of land was not related to the claims of an illegal ordinance and fraudulent assessment since he read the complaint. He also prepared the May 95 order based on the March 95 bench ruling which reviewed the claims that would be res judicata (Exh. J, p. 41). So, he had a duty to disclose the fact that the panel had made a colossal error in order to prevent **hampering the administration of justice** and taking advantage of that error for his client's benefit.

s) The panel's refusal to address the fraud or denial of due process by an attorney clearly proves a bias in the attorney's favor and against me as a pro se. In the alternative, it proves the panel knew the allegations had nothing to do with its opinion. So, it didn't want to consider a fraud issue because it didn't want to recall the sanction, which further proves bias.

t) By refusing to rule on the fraud or denial of due process, the panel is saying that an attorney can conceal allegations that are inconsistent with its opinion, which proves it failed to read those allegations before affirming a colossal error. The facts in the record prove the district court failed to read the complaint in the motion for failure to state a claim. Having refused to read the complaint pursuant to Haines v. Kerner, the panel avoids the allegations that prove the district court imposed a sanction without regard for the allegations. So, concealment of the allegations clearly hampers the administration of justice.

u) The panel refuses to recall the sanction and res judicata in Rockaway's favor because that would admit its refusal to read the complaint pursuant to cited standards was prejudicial. That would require reading and accepting the allegations of fraudulent concealment, equitable tolling and a continuing violation, as well. Having read the EPA conspiracy outlined in Exh. b to the complaint, p.77, the panel decided to leave me subject to a sanction in order to conceal that conspiracy.

v) My tolling allegation was the result of exhibits filed by the EPA in the former case. Those exhibits are now exhibits a-c to the complaint, which admits a continuing conspiracy by the EPA (Exh. K-b, p.77). These exhibits became available after the complaint in the former case was filed. These exhibits further explain the district court's August 95 summary judgment ruling though it lacked jurisdiction in three ways. It was trying to block a future action on res judicata grounds because it

knew the EPA admitted a conspiracy in its own memo. But, the district court never amended the May 1995 order, which was affirmed thus preserving the claims dismissed without prejudice.

w) My appellate brief argued law of the case (Exh. P). It pointed out the May 1995 order was affirmed by a former panel. Therefore, law of the case bars the district and appellate courts from modifying an affirmed dismissal without prejudice, because such an order has no res judicata effect (Exh. O) and expressly preserves the claims that were affirmed. Moreover, collateral estoppel of an affirmed order would override the affirmation contrary to law of the case, unless an error was claimed. The federal defendants never claimed error and the panel never addressed this argument. Instead, the panel overlooks the denial of due process because it proves the August 95 order was void, and disregards law of the case so it could affirm res judicata in EPA's favor in order to bar a case with an admitted federal conspiracy. Since the motion to recall shows the August 95 order is void, the affirmed May 95 dismissal without prejudice should have resulted in reinstatement.

x) I also cited a Supreme Court ruling as a standard of review (Exh. O). It held a dismissal without prejudice has no res judicata effect. Between that citation and the law of the case, neither court had any basis to affirm res judicata in EPA's favor since the current complaint did not involve the APA claim.

y) The panel denied the motion to recall the August 95 order although it was void so it didn't have to find the May 95

dismissal without prejudice could not support res judicata.

z) The panel's denial of the motion to recall was an abuse of discretion on the basis of the arguments set forth in the motion to recall. Moreover, the above conduct shows the panel overlooked what it wanted in order to shape the opinion it wanted to render in order to dispose of a pro se.

aa) The denial of the motion to recall prejudices a Rule 60(b) action.

bb) The panel denied the motion to recall in the hope that I would be unable to find any authority to warrant a review for abuse of discretion by this Court.

cc) The bias appears to be circuit wide since it emanates from a panel that includes the chief judge.

2) In summary, the panel overlooked; cited standards of review, legal arguments, an admitted denial of due process, failure to outline standards applied to the complaint, concealing its deferential standard, refusing to correct its errors, refusing to address a fraud upon the court, refusing to address a void order, refusing to provide a review consistent with cited standards, and leaving me subject to a sanction it knows to be unconstitutional. As a reasonable person I find the panel's actions between its review and the motion to recall on so many issues is proof of an extrajudicial bias. There are to many errors to be plain error.

3) I realize this certification makes serious inferences against three appellate judges, and a district court judge. I didn't raise these issues in my former petition for certiorari because it could

have been plain error. So, I gave the panel the benefit of the doubt and the opportunity to correct to prove they erred. I am now convinced they prove bias, not errors. So, I am being very specific about the facts and inferences that prove bias in this review for abuse of discretion. I trust the Solicitor General will be equally specific in proving how each of the above could be plain error and how my inferences are flawed. If not, the Solicitor General should admonish conduct that denies the opportunity to be heard.

4) I believe the nature and quantity of the conduct by the district and appellate courts indicates a custom of treating pro se litigants in a similar manner in order to dispose of actions against federal agencies by way of motion. This conduct undermines the integrity of the federal judicial system by allowing judges to use their vast experience to dispose of inexperienced pro se litigants by means of conduct that the judges believes the litigant will be unable to uncover or overcome. Hence a refusal to consider this petition by this Court would be an abuse of its discretion by allowing such conduct to flourish and go unabated.

5) I find the conduct exhibited by the panel and district court analogous to raising the bet in a poker game [1] in order to force the others player out. Except, the court is not a player, it's supposed to

---

[1] Deliberate abuses of discretion to avoid finding the district court abused its discretion. Then preparing a cryptic opinion that would prevent uncovering the misconduct of the panel, so it could deny a petition for rehearing. Lastly, to deny a motion to recall though the errors and misconduct are attributable to the panel, district court, and the attorney for one of the defendants indicates a pattern of conduct aimed at denying due process to a pro se.

be the pit boss (impartial). But, it appears to have stacked the deck (prejudiced) in favor of the house (government).

6) I am convinced by the above conduct that the district and appellate courts abused their discretion and denied me due process so it could keep the EPA's conspiracy from trial. Therefore, the federal courts in this case are part of the problem, not part of the cure. I cannot express how it feels to come to a federal court for justice only to find the judges are worse than the federal agency your suing since they are supposed to dispense justice pursuant to the law. It proves that individuals have a snowballs chance in hell when judges manipulate the facts they want to decide.

7) Unfortunately, the conduct of the district and appellate courts puts the integrity of this Court into serious question.

CERTIFICATION

I HEREBY CERTIFY that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment under the rules of court.

June 20, 1999 _____